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CHARLES ELMORE CROP
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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1936.

No. 658.

PAUL SENN,

Appellant,

vs.

TILE LAYERS PROTECTIVE UNION, LOCAL NO. 5, CHARLES SCHREIBER et al.,

Respondents.

Appeal from the Supreme Court of the State of Wisconsin.

APPENDIX TO RESPONDENTS' BRIEFS.

JOSEPH A. PADWAY,
Counsel for Respondents.

ST. LOUIS LAW PRINTING CO., 415 North Eighth Street. CE ntral 4477.

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AMERICAN FURNITURE CO. v. I. B. OF T. C. AND H. OF A., CHAUFFEURS, TEAMSTERS AND HELPERS GENERAL LOCAL NO. 200 OF MILWAUKEE ET. AL.

SUPREME COURT OF WISCONSIN.

June 29, 1936.

Appeal from a judgment of the Circuit Court for Milwaukee County; Daniel W. Sullivan, Judge.

Affirmed. (Fairchild, Fowler, and Nelson, JJ., dissenting.)

This was an action commenced on September 11, 1935, by American Furniture Company against I. B. of T. C. and H. of A., Chauffeurs, Teamsters and Helpers General Local No. 200 of Milwaukee, Wis., Joseph F. Scislowski, William Nagorski, Furniture Sales and Servicemen's Union Local 1342, Alex. H. Kolbing, and Philip F. Koerner, in which an injunction was sought restraining the picketing by defendants of a retail furniture store owned and operated by plaintiff in the city of Milwaukee. The action was tried to the court upon a stipulation of facts. Findings of fact and conclusions of law were duly made and entered, and a judgment entered in accordance with the findings and conclusions on December 19, 1935. By the terms of this judgment, it was decreed that the Wisconsin Labor Code, sections 103.51-103.63, inclusive (formerly numbered sections 268.18-268.30, inclusive), is constitutional and valid; that the action involves a labor dispute within the meaning of section 103.62 (formerly section 268.29), Stats., and that the Wisconsin Labor Code is applicable thereto; that the prayer of the complaint to prohibit all picketing of plaintiff's store and all persuasion of persons

to refrain from dealing with plaintiff and from representing that plaintiff is unfair to organized labor be denied; that defendants are restrained from employing more than four pickets; from so picketing as to interfere with rights of customers to have free ingress and egress from plaintiff's store; from intimidating customers of plaintiffs or the public who may become customers; from displaying to customers and other people signs or banners stating that plaintiff is unfair to organized labor or unfair to the defendant unions, unless the banners also fairly state in immediate connection therewith the essential facts of the labor dispute; from stating orally or in writing or printing to the public the same matters unless accompanied by the same exposition of the facts; and from in any manner publishing or representing that there is a strike at plaintiff's store.

Plaintiff appeals. Defendants filed a motion to review such portions of the judgment as impose restraints upon defendants. This motion, however, has been abandoned, and defendants make no effort to sustain it either in brief or oral argument.

The material facts will be stated in the opinion.

Wickhem, Justice.

The facts in this case are not in dispute, and the questions presented are two: (1) Upon the facts presented, was there a labor dispute as defined in subsection 3 of section 103.62 so as to bring the activities of defendants within the protection of the Wisconsin Labor Code and render lawful picketing of plaintiff's store by defendants? (2) If so construed, is the labor code to that extent unconstitutional, (1) as denying due process and equal protection of the laws as guaranteed by the Fourteenth Amendment to the Federal Constitution, and (2) as invalidly limiting the jurisdiction of the circuit court in violation of sections 1, 9, and 22 of article 1, and sections 2 and 8 of article 7 of the Constitution of Wisconsin.

It now becomes convenient to state briefly the facts as set forth in the stipulation.

Plaintiff is a corporation engaged in the retail furniture business. Its employees include seventeen men who are workers in the crafts represented by defendant unions. None of the seventeen employees are members of the defendant unions. Many of these employees have been employed by plaintiff continuously for ten or more years. On July 15, 1935, defendant Koerner, business agent of defendant Local 1342 Furniture Sales and Service Men's Union, communicated to plaintiff a request that plaintiff execute certain contracts affecting the labor relations of plaintiff's employees in the crafts represented by the union. The proposed contracts involve the following agreements on the part of the employer:

(1) Recognition of the unions as bargaining agents in matters of wages, hours, and working conditions for the respective crafts; (2) the payment of a wage scale included in the agreement; (3) regulation of hours and holidays. Other details of the relationship such as vacations with pay, the seniority rule with respect to lay-offs, an agreement that the employer will not, during the term of the contract, attempt to persuade any employee not to join the union and other matters were covered by this proposed agreement. The president agreed to submit the matter to the directors, but expressed some doubt as to the disposition of the company to sign the contract, whereupon Koerner stated that unless the contracts were signed the unions would picket the store. The officers of plaintiff brought the demands of the union to the attention of the seventeen employees affected by the contracts. These employees thereupon took a secret ballot on the question whether they desired to join one of the defendant unions and unanimously voted against so joining. The result of the vote being communicated to the representatives of the union, Koerner insisted that plaintiff require the employes to join one of the unions, and upon their refusal, the unions would

furnish men to fill their places from its members or from men who were willing to join unions. One of the officers of plaintiff then stated that plaintiff company had no objection to the men joining the union, but did not feel it proper to bring pressure upon the men to join since that was a matter which should be left to the employees to decide; that if the defendant unions desired to induce the employees to join and the men were willing to do so, there would be no objection on the part of the plaintiff. Several days thereafter, representatives of the union expressed doubt whether the vote previously taken was the free expression of the employees. As a result, the employees were requested to reconsider their answer, and representatives of the plaintiff told the employees that they were perfectly free to do as they desired, and that whatever course they took would be satisfactory to the company. The vote was again taken and resulted in a unanimous decision not to join the union and in an expression of satisfaction with their services, labor conditions, and relations with their employer. Plaintiff elected to abide by the employees' decision and declined to sign the contracts.. On September 3, 1935, picketing of plaintiff's store took place. The character of the picketing need not be discussed since defendants have abandoned their motion to review, and plaintiff's appeal is based on a contention that, under the facts as presented, picketing in any form is not permitted by the code.

Upon these facts, the question is squarely presented whether there was a labor dispute involving plaintiff and defendants in view of the fact (1) that no employee of plaintiff was a member of defendant unions; (2) that none desired or was willing to become a member; (3) that the employees were wholly satisfied with the conditions of their employment; (4) that the employees opposed the execution of the contracts proposed for plaintiff's execution; (5) that plaintiff has been unwilling to coerce its employees to join the unions and has throughout been willing to take such position in that respect as its employees desired.

Section 103.62 (3) reads as follows:

> "The term 'labor dispute' includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, *or concerning employment relations, or any other controversy arising out of the respective interests of employer and employe,* regardless of whether or not the disputants stand in the proximate relation of employer and employe."

The act of which this section is a part is substantially similar to the Federal Norris-LaGuardia Act (29 U. S. C. A. §§ 101-115). The italicized words in section 103.62 (3) are not contained in the Norris-LaGuardia Act as finally enacted by Congress, although this clause was in the act as originally introduced. Consideration must also be given to sections 103.62 (1) and (2) which read as follows:

> "When used in sections 103.61 to 103.63, and for the purposes of these sections:
>
> "(1) A case shall be held to involve or to grow out of a labor dispute when the case involves persons who are engaged in a single industry, trade, craft, or occupation; or who are employes of one employer; or who are members of the same or an affiliated organization of employers or employes; whether such dispute is (1) between one or more employers or associations of employers and one or more employes or associations of employes; (2) between one or more employers or associations of employers and one or more employers or associations of employers; or (3) between one or more employes or associations of employes and one or more employes or associations of employes; or when the case involves any conflicting or competing interests in a 'labor dispute' (as defined in subsection (3)) of 'Persons participating or interested therein' (as defined in subsection (2)).
>
> "(2) A person or association shall be held to be a person participating or interested in a labor dispute

if relief is sought against him or it and if he or it is engaged in the industry, trade, craft, or occupation in which such dispute occurs, or is a member, officer, or agent of any association of employers or employes engaged in such industry, trade, craft, or occupation."

Preliminary to a determination of the scope and meaning of the labor code, it is necessary to give some attention to precedent legislation and judicial decision. Prior to adoption of the code, the only legislation in Wisconsin dealing with injunction in connection with picketing activities was section 133.07, which was substantially equivalent to the Clayton Act (38 Stat. 730) covering the same general subject. See Monday Co. v. Automobile, Aircraft & Vehicle Workers, etc., 171 Wis. 532, 177 N. W. 867, where this court characterized section 133.07 as an attempt to engraft upon the laws of this state certain provisions of the Act of Congress commonly known as the Clayton Act.

Subsection 1 of the section provides that working people may organize and carry on labor unions for the promotion of their general interests as workers. Subsection 2 provides that no restraining order or injunction will be granted by any court of this state in any case between an employer and employees or between employers and employees, or between employees, or between persons employed and persons seeking employment involving and growing out of any dispute whatever concerning employment, unless necessary to prevent irreparable injury to property and for which there is no adequate remedy at law. Subsection 3 provides in substance that no such restraining order shall prohibit any person or persons, whether singly or in concert, from terminating the relation of employment and ceasing to work or advising or persuading others by personal means to doing so, or from peacefully persuading any person to work or to abstain from working or from ceasing to patronize or employ any party to such dispute and other enumerated actions. The only interpretation of section 133.07 by this court was in the Monday Case, supra. It was there held that a dispute over the

maintenance of a closed shop was not within the protection of section 133.07. Since the section in question is so similar to the Clayton Act, it is of some moment to consider the interpretation of the Clayton Act by the United States Supreme Court.

The principal case is that of Duplex Printing Press Co. v. Deering, 254 U. S. 443, 41 S. Ct. 172, 178, 65 L. Ed. 349, 16 A. L. R. 196. This was a suit in equity to restrain defendants from maintaining a boycott. Complainant was a manufacturing concern employing, among others, some 200 machinists. Defendants were the business agents of the machinists' union and the union itself. Plaintiff conducted an open shop without discrimination between union and non-union men. None of the defendants was or ever had been an employee of complainant, nor had the plaintiff been in any relationship whatever with the defendant unions. The union called a strike in plaintiff's factory as a result of which about 14 union machinists left complainant's employ. This, however, did not materially interfere with the operation of the factory. Defendants proceeded to warn customers that it would be better for them not to purchase or install presses made by complainant and to threaten them with loss if they did so; to threaten sympathetic strikes in other trades; to threaten a trucking company with trouble if it hauled presses manufactured by plaintiff; to incite employees of the trucking company to strike in order to interfere with the hauling and installation of presses; to demand that the repair shop do no work on Duplex presses; and to threaten union men with loss of union standing if they participated in the installation of such presses.

The lower court was of the opinion that these acts constituted an interference with interstate commerce subject to being enjoined unless the Clayton Act forbade this injunction. The principal question upon appeal was whether under section 20 of the Clayton Act (29 U. S. C. A. § 52), which is substantially subsection 2 of section 133.07, Stats., there was such authorization of defendant's conduct as to

require the conclusion that no injunction should issue. It was held that all of the provisions of section 20 are subject to a general qualification respecting the nature of the controversy and the parties affected. It was held that the restriction upon the use of the injunction was in favor only of those concerned as parties to such a dispute as the act describes. The court repudiated the conclusion of the Circuit Court of Appeals (252 F. 722) that the words "employers" and "employees" refer to the business class or clan to which the parties litigant belong, thus bringing within the operation of section 20 a dispute between the machinists' union or its members and the plaintiff, although these members stand in no relation to plaintiff. "Congress had in mind particular industrial controversies, not a general class war. 'Terms or conditions of employment' are the only grounds of dispute recognized as adequate to bring into play the exemptions." It was held that the action could not be regarded as bringing in all members of the labor union as parties to a dispute which proximately affected only a few of them.

The dissenting view was expressed by Mr. Justice Brandeis, who was of the opinion that defendants had a common interest threatened by plaintiff, and that it was legitimate for the union to refuse to handle materials, the production of which would weaken the standing and efficiency of the union in protecting the interest of its members. He expressed the opinion that the act as a whole gave no evidence of being restricted to legal relations between a specific employer and his employees and asserted that the majority opinion proved too much because it would automatically withdraw from the protection of the act the striker who by his very act of striking terminated his employment.

In the case of American Steel Foundries v. Tri-City Central Trades Council et al., 257 U. S. 184, 42 S. Ct. 72, 66 L. Ed. 189, 27 A. L. R. 360, which followed the Duplex Case, supra, the facts were as follows:

Plaintiff was a corporation operating a factory for the

manufacture of steel products. It sought to enjoin the Tri-City Trades Council and 14 individual defendants, some of whom were officers of the council, from conspiring to prevent plaintiff from obtaining and retaining skilled laborers in its plant. It was charged that the conspiracy was executed by organized picketing accompanied by threats, intimidation, and violence, against persons employed or seeking employment with plaintiff. Defendants admitted picketing for the purpose of notifying persons entering the plant that a strike was called because of reduction of wages and to persuade such persons not to replace striking workmen. Defendant denied threats or violence or responsibility for any such activities. An injunction issued enjoining defendants in any manner by use of persuasion, threats, personal injury, intimidation, from hindering, stopping, obstructing any person in the employ of the complainant and from picketing or maintaining at or near the premises of complainant or on the streets leading to these premises any picket or pickets. The Tri-City Council was a labor organization consisting of representatives of 37 trade unions in three cities. In 1914, plaintiff, which ordinarily employed 1600 men and whose plant had been closed for some 6 months, opened operations with 350 regular men, 150 being skilled workmen. The men employed on the reopening of the plant were offered a lower wage. The Tri-City Council sought to intervene and to negotiate for a restoration of the wage, but were informed that plaintiff was running an open shop and did not propose to recognize or deal with labor unions. On April 22, the council declared a strike, displayed a sign outside the entrance announcing the strike, and called on union men to stay away from the works. Only 2 men acted on the order to strike, 1 a member of the machinists' union and 1 who was not a union member. After discussing the evidence, the court states that it is clear that violent methods were so pursued as to characterize the attitude of the picketers as continuously threatening, and that it had the effect of putting employees and would-be employees in such

fear that many abandoned work. The question was whether section 20 of the Clayton Act was applicable. It was held, following the Duplex Case, that section 20 applied only to cases growing out of a dispute between the employer and employee concerning terms or conditions of employment. Only 2 of the defendants (the 2 who responded to the strike order) were employees qualified to invoke section 20. As to them, the court considered how far under section 20 their conduct might go without constituting a violation of the rights of those whom they would influence. It was the view of the court that picketing must not be done under circumstances which constitute intimidation or by numbers that produce such a result, and that the acts of defendant employees were not within the protection of section 20. The decree was modified as to them, howeevr, by striking the restraint against "persuasion."

The next question was thus stated: Is interference of a labor organization by persuasion and appeal to induce a strike against low wages without lawful excuse and malicious when its members are in the employ or have been in the employ of the employer involved? The court held that this must receive a negative answer under the Clayton Act. It was recognized that to make labor organization effective employees must make their combination extend beyond one shop, for the reason that the conditions in one shop are bound to affect the standards and wages in other shops at least in the neighborhood. It was considered that unions may use all lawful propaganda to enlarge their membership, especially among whose labor at lower wages will injure the entire guild. The Hitchman Case (Hitchman Coal & Coke Co. v. Mitchell), 245 U. S. 229, 38 S. Ct. 65, 62 L. Ed. 260, L. R. A. 1918 C, 497, Ann. Cas. 1918 B, 461, is distinguished on the grounds that there the purpose to induce a breach of contract was not lawful and that here it is. The Duplex Case, supra, is distinguished because that dealt with a secondary boycott on the part of persons having nothing to do with the machinists' union. Since the acts with which defendants are charged involved no

secondary boycott, and since there was in fact a dispute between an employer and a labor union, many of whose members were employees and many more of whose members had been employees and might reasonably be expected to be re-employed, the court held that the injunction should be modified by deleting the restraint against persuasion.

The Tri-City Case followed the Duplex Case in holding that section 20 had application only to the two members of the union who at that time happened to be employed by the plaintiff. However, the opinion recognizes that employees must make their combination extend beyond one shop in order to avoid the general lowering of the standards in other shops and that they may engage in lawful propaganda to this end and also, with certain limitations, in peacefully persuading employees to leave an employer. While the Duplex Case holds that a labor union, none of whose members are working for a particular employer, has no right to adopt coercive measures for the purpose of unionization, the Tri-City Case holds that if a union has members working for the particular employer, it may employ, under the protection of the Clayton Act, peaceful persuasion, at least for the purpose of improving wages and working conditions. There appears to be no doubt that the limited effect given to the Clayton Act by these decisions aroused the dissatisfaction of labor and brought the attention of Congress to the subject, resulting in the enactment of the Norris-LaGuardia Act. The House Committee Report on the Norris-LaGuardia Act refers to the Duplex and Tri-City Cases and recites the fact that the act was construed to restrict the use of injunctions in favor only of the immediate disputants "and that other members of the union not standing in the proximate relation of employer and employee could be enjoined." With respect to section 13 of the Norris-LaGuardia Act (29 U. S. C. A. § 113), containing a definition of a labor dispute, the report states that this section contains "a definition of a person participating in a labor dispute which is broad

enough to include others than the immediate disputants and thereby corrects the law as announced in the case of Duplex Printing Press Co. v. Deering," supra, which is said to have held that section 20 of the Clayton Act "only related to those occupying the position of employer or employee and no others." The report quotes Mr. Chief Justice Taft's statement in the Tri-City Case as to the necessity for labor organizations to enter labor disputes for the purpose of protecting general standards of working conditions. It concludes that since labor has the right to combine for the purpose of securing increased wages or better conditions of labor, and since the strike is a lawful instrument in the struggle between employer and employee, it would be hypocrisy to concede these rights and then to prohibit any effective exercise of them by labor. The primary purpose of the legislation is said to be to protect, first, the right of free association, and, second, the right to advance the lawful object of association.

[1] It is contended by plaintiff that both the language of the Norris-LaGuardia Act and the committee reports respecting it indicate a purpose merely to avoid the unduly restrictive interpretation given to the Clayton Act by the Duplex Case and other cases and to confer upon workmen the right of effective association referred to by Chief Justice Taft in the Tri-City Case; that decisions following the Norris-LaGuardia Act have so construed the act, notably United Electric Coal Companies v. Rice (C. C. A.) 80 F. (2d) 1, and Lauf v. E. G. Shinner & Co. (C. C. A.) 82 F. (2d) 68. The latter case construed and applied the provisions of the Wisconsin Labor Code which it held to be not materially different from those of the Norris-LaGuardia Act.

Specifically, it is the contention of plaintiff that the Norris-LaGuardia Act and the Wisconsin Labor Code enlarge the immunities conferred by the Clayton Act and its Wisconsin equivalent so as to enable employees engaged in a dispute with their employer to receive the aid of others in the same craft or industry, but that both these

acts, like the Clayton Act, depend for their application in every instance upon the existence of a basic employee-employer dispute. It is claimed that the text of the act supports this view. This claim necessitates an examination of the language of subsections (1) and (3) of section 103.62.

With respect to subsection (3), it is contended that the words "regardless of whether or not the disputants stand in the proximate relation of employer and employe" were inserted merely to repudiate the doctrine of the Duplex Case which made the Clayton Act available only to the actual employees and to repudiate the rule that other members of a union not standing in the proximate relation of employer and employee could be enjoined from interference in the dispute. This view was taken by the Circuit Court of Appeals for the 7th Circuit in the United Electric Coal Companies and Lauf Cases, supra. In the first of these, United Electric Coal Companies v. Rice, supra, plaintiff operated a mine. It had a contract with the United Mine Workers of America, and this contract called for the employment of members of this union. A rival union sought to oust the United and demanded recognition as the union with which plaintiff must deal. There was no dispute in the plant as to wages or working conditions. This court held that the Norris-LaGuardia Act did not apply to give the Progressive union any standing as a disputant. It held that there must be a dispute between the employer and employee growing directly out of their relationship; that the act does not apply to disputes between employees or to disputes between employee unions to which the employer is not a real party. It held that there was no controversy between the plaintiff and the Progressive union on any subject. The plaintiff's men could join any union they wished.

In Lauf v. E. G. Shinner & Co. (C. C. A.) 82 F. (2d) 68, the question involved was the right of a union to picket the plaintiff's market in Milwaukee. In that case there was no dispute between the employer and employees, and

the labor union did not represent any of the employees of the plaintiff. It was held that no labor dispute existed within the meaning of the Wisconsin act or Norris-LaGuardia Act; that the Wisconsin act is not materially different from the Norris-LaGuardia Act; and that on the authority of the United Electric Coal Companies Case there must be a labor dispute between the employer and employee before outsiders may participate. Some weight is also given to the fact that under the Wisconsin and federal acts any coercion of its employees by plaintiff would be a violation of the act.

In spite of the authority of these cases, it is our view that the language of the labor code is plain and unambiguous and does not exact as a prerequisite to a labor dispute that there be a controversy between an employer and his employees. Subsection (3) makes the scope of a controversy broad enough to include questions relating to association or representation of persons relative to conditions of employment or industrial relations, and this regardless of whether or not the disputants stand in the proximate relation of employer and employee. While an able argument is made to the effect that this last clause was merely intended to permit a labor union to come to the aid of members or at the most workmen who are engaged in a labor dispute, this construction cannot be sustained. It is the disputants who need not stand in the relation of employer and employee. Plaintiff's contention implies that basically the disputants must be the employer and the employee, whereas the act plainly indicates that the disputants, that is to say, the principals to a labor dispute, need not stand in the relation of employer and employee. This is further fortified by subsection (1) which provides as follows:

> "(1) A case shall be held to involve or to grow out of a labor dispute when the case involves persons who are engaged in a single industry, trade, craft, or occupation; or who are employes of one employer; or who are members of the same or an affiliated organization

of employers or employes; whether such dispute is (1) between one or more employers or associations of employers and one or more employes or associations of employes; (2) between one or more employers or associations of employers and one or more employers or associations of employers; or (3) between one or more employes or associations of employes and one or more employes or associations of employes; or when the case involves any conflicting or competing interests in a 'labor dispute' (as defined in subsection (3)), of 'persons participating or interested' therein (as defined in subsection (2))."

This language is extremely broad and we find it impossible to escape the conclusion that labor unions have standing as disputants, provided the subject-matter of the dispute comes within the definitions as set forth in subsection (3), and this in spite of the fact (1) that there is no dispute between the employer involved and his employees; (2) that no members of the union are employed by the employer in question; and (3) that the only dispute relates to the unionization of the plant. Apart from the language of the act, we cannot believe, in the light of the history of this legislation, that either the Norris-LaGuardia Act or Wisconsin Labor Code was ever designed to have the limited effect contended for by plaintiff. Only a strained construction of the House Committee Reports and the text of the statutes can give color to such an argument.

One of the committee consultants when the Norris-LaGuardia Act was under consideration in Congress was Prof. Frankfurter of the Harvard Law School. In his text on the subject of "The Labor Injunction" it is said, after reciting the problem with which the Norris-LaGuardia Act deals: "How far a union in one craft may use its power to achieve the unionization of non-union plants within the same craft. • • •" He states that section 9 of the proposed bill (29 U. S. C. A. § 109) settles all of these questions so far as application for equitable relief is concerned. "Immunity from injunctions extends to all the categories

we have described save alone as to persons who are not engaged in the same industry with the complainant. * * * The interpretation given to the Clayton Act by the Duplex Case to the effect that the privileges of that act may be invoked only in a dispute between an employer and his employees, is thus rendered innocuous. * * *"

It is plain to us that the proponents of the Norris-LaGuardia Act intended to enact into law the views thus expressed in Exchange Bakery & Restaurant v. Rifkin, 245 N. Y. 260, 157 N. E. 130, 132:

> "The purpose of a labor union to improve the conditions under which its members do their work; to increase their wages; to assist them in other ways, may justify what would otherwise be a wrong. So would an effort to increase its numbers and to unionize an entire trade or business. It may be as interested in the wages of those not members, or in the conditions under which they work as in its own members because of the influence of one upon the other. All engaged in a trade are affected by the prevailing rate of wages. All, by the principle of collective bargaining. Economic organization to-day is not based on the single shop. Unions believe that wages may be increased, collective bargaining maintained only if union conditions prevail, not in some single factory, but generally. That they may prevail, it may call a strike and picket the premises of an employer with the intent of inducing him to employ only union labor. And it may adopt either method separately. Picketing without a strike is no more unlawful than a strike without picketing. Both are based upon a lawful purpose. Resulting injury is incidental and must be endured."

This seems to have been the view of the court in Levering & Garrigues Co. v. Morrin (C. C. A.) 71 F. (2d) 284. See, also, Miller Parlor Furniture Co. v. Furniture W. I. Union (D. C. N. J.) 8 F. Supp. 209; Cinderella Theater Co. v. Sign Writers' Local Union (D. C.) 6 F. Supp. 164; 36 Col. Law Review, 157.

We consider that the language of this act clearly accom-

plishes that result. The addition to the Wisconsin Labor Code heretofore indicated by italics which extends the scope of labor disputes to controversies concerning employment relations or any other controversy arising out of the respective interests of employer and employee makes it even clearer that such was the intention of the Legislature in enacting this subsection.

[2] That the act as so construed is unconstitutional is the next assertion made by the plaintiff. The first contention is that the act is invalid under the Fourteenth Amendment because it authorizes an unwarranted and unreasonable interference with the right of plaintiff to carry on its business and that of its employees to bargain collectively, that it denies plaintiff equal protection of the laws, and that it is not a legitimate exercise of the police power. Plaintiff's principal reliance is upon the case of Truax v. Corrigan, 257 U. S. 312, 42 S. Ct. 124, 128, 66 L. Ed. 254, 27 A. L. R. 375.

In the Truax Case plaintiffs owned a restaurant in the city of Bisby, Ariz. The defendants were cooks and waiters formerly in plaintiff's employ and the labor union and trades' assembly of which they were members. In April, 1916, a dispute arose between plaintiffs and the union concerning terms and conditions of employment of members of the union employed by plaintiff. Plaintiff refused the demands of the union, and it ordered a strike of its members who were in plaintiffs' employ. Thereafter, defendants entered into a conspiracy and boycott to enforce the demands of the union. The method included picketing, displaying banners advertising the strike, denouncing plaintiffs as unfair to the union, circulation of hand bills containing abusive and libelous charges against plaintiffs and intimations of injury to future patrons. The state of Arizona had a statute with provisions substantially similar to those of the Clayton Act. It was argued that if these provisions made defendants' acts lawful, plaintiffs' rights under the Fourteenth Amendment were violated and the law void. The state courts dismissed the

complaint. The state Supreme Court (20 Ariz. 7, 176 P. 570) took the position that the gist of plaintiffs' charge was that defendants were merely inducing patrons to cease patronage by making public the fact of the dispute and the attitude of plaintiffs in it; that no man has a fixed property right in the esteem of the public; that while plaintiff had a right to refuse the demands of the union, the union had a right to advertise the cause of the strike; that picketing, if peacefully carried out for a lawful purpose, was not a violation of plaintiffs' rights under the Arizona statute; and that while picketing was unlawful in Arizona prior to this act, plaintiffs had no vested right to have such a rule continue in that state. The Supreme Court of the United States held that under the statute as thus construed, picketing may be exercised in any form without invading plaintiffs' rights, providing violence is not employed. The court describes the method of picketing by defendants as follows: (1) Having agents of the union walk back and forth constantly during business hours displaying a banner announcing that the restaurant was unfair to cooks, waiters, and their union; (2) having these agents attend at or near the entrance to the restaurant and announce the same matters in a loud tone of voice; (3) characterizing employees of plaintiff as scab Mexican labor and applying opprobrious epithets to them in hand bills circulated to would-be customers in front of the restaurant; (4) including in such hand bills abusive and libelous attacks upon the senior member of plaintiffs' firm; (5) seeking to disparage food, service, and prices and general conduct of plaintiffs' restaurant; (6) attacking the character of those who would patronize the restaurant; and (7) threatening those who disregarded the urging of the pickets and actually patronized plaintiffs' restaurant. The court states the real question to be whether the means used were legal and concludes that they were not and that the defendants' acts constituted palpable wrongs. The court states:

"It was not lawful persuasion or inducing. It was

> not a mere appeal to the sympathetic aid of would-be customers by a simple statement of the fact of the strike and a request to withhold patronage. • • • It was moral coercion by illegal annoyance and obstruction, and it thus was plainly a conspiracy."

It was held that an act which operates to make lawful such a wrong deprives the owner of the business of property without due process and is void under the Fourteenth Amendment. In reply to the contention that this was a proper exercise of the police power and that property rights must yield to such power reasonably exercised, the court says:

> "The broad distinction between one's right to protection against a direct injury to one's fundamental property right by another who has no special relation to him, and one's liability to another with whom he establishes a voluntary relation under a statute is manifest upon its statement."

It is pointed out that this is not a mere case of a peaceful secondary boycott as to the illegality of which courts have differed. Here the illegality of the means was without doubt and fundamental. The means used were libelous and abusive attacks on the plaintiffs' reputation, like attacks on their employees and customers, threats of such attacks on would-be customers, picketing and patrolling of the entrance to their place of business, and the consequent obstruction of free access thereto—all with the purposes of depriving the plaintiffs of their business. To permit these definitely illegal acts and to decline to give a remedy effective against them would be to deny and disregard fundamental rights of liberty and property. Under the Constitution of Arizona, the plaintiffs would have had the right to an injunction. If defendants' acts had been done as the result of any other controversy than a labor dispute, an injunction would necessarily have issued. To deny it in this case would be to deny equal protection of the laws.

It seems to us that this case is not applicable to the present situation. As we read the case, it is held that with respect to acts constituting libel, slander, intimidation, threats, breaches of the peace, or threatened breaches of the peace, which are recognized as definitely illegal, statutory immunity from legal redress cannot validly be conferred upon labor unions, and the Legislature must retain and give effect to all legal and equitable remedies created by the Constitution for the enforcement of rights and the redress of wrongs. See 13 N. Y. U. L. Q. Rev. 92, at page 96. It is not apparent to us, however, that the Legislature may not recognize the peculiar status of labor organizations in labor disputes because of the self-interest of the union and its members and the assumed necessity for protective group action and confer an immunity with respect to acts involving none of these wrongful features whether they take the form of picketing or not. There is no substantial question of classification. To hold that there was would put into question the validity of both the Clayton Act, the Norris-LaGuardia Act, and the Wisconsin Labor Code, no matter how these acts were construed.

[3, 4] The question is whether the Legislature may declare lawful acts on the part of workingmen or groups of them that in its judgment are necessary in order to give to labor an economic weapon which tends to balance the capacity for economic duress which past conditions have created in the employer. We discover no constitutional provision which denies this power to the Legislature. The evils which may and do flow from the natural bargaining advantage held by the employer may be recognized as calling for legislative correction and conceivably may be met in a variety of ways. It has here been met by equalizing the bargaining power of labor and leaving the determination of wages and working conditions to the play of economic forces. We cannot say that the Legislature may not validly permit acts on the part of labor organizations not intrinsically wrongful as involving violence, intimidation, or misrepresentation, the purpose of which is to give

notoriety to the attitude of the employer in a labor dispute. That the philosophy underlying such immunities is that the worker should have some economic advantage to balance that theretofore held by the employer and arising out of the control of jobs, is not a sufficient reason for denial of the legislative power, or for the conclusion that the exercise of this power results in the impairment of the constitutional rights of the employer. If it is, then the act cannot be sustained on any construction. The presence of a few union members in plaintiff's employ or the existence of a dispute between plaintiff and its employees would not be a circumstance sufficient to validate immunities extended to those not in plaintiff's employment, if these immunities were intrinsically beyond the power of the Legislature to confer. Assuming a dispute between employer and employee, the only justification for extending the provisions of the code to outside organizations is their general self-interest in procuring satisfactory working and bargaining conditions in the craft or industry represented, and this interest exists whether the employees are in dispute with their employers or not. We conclude that the act as we construe it does not deny to plaintiff due process or equal protection of the laws and is a valid exercise of legislative power so far as this objection is concerned. Whether such laws constitute a wise solution may, of course, be fairly put in question, but the forum for such a controversy is the Legislature and not the courts. The question is irrelevant here, and we cannot resist the conclusion that one of the purposes of the labor code was to make it so and to substitute a legislative declaration of policy for the varying standards and views theretofore expressed in judicial opinions.

[5, 6] The next contention is that the Wisconsin Labor Code, if construed to deny injunctive relief in such a situation as was here presented, is violative of sections 1, 9, and 22, art. 1, and sections 2 and 8, art. 7, of the Constitution of Wisconsin. Article 7, § 2, vests the judicial power in this state both in matters in law and equity in the

Supreme Court, circuit courts, etc. Section 8 of article 7 confers original jurisdiction upon certain courts and confers upon them the power to issue writs of injunction necessary to carry into effect their orders, judgments, and decrees. Article 1, § 9, provides that every person is entitled to a certain remedy in the laws for all injury or wrongs which he may have received in his person, property, or character. The act is claimed invalidly to limit the equitable powers of the circuit court. It is not necessary to discuss here the undoubted limitations upon the power of the Legislature to diminish the jurisdiction of the circuit court. It is beyond question that the Legislature may change the substantive law and in doing so increase or reduce the subject-matter upon which the jurisdiction of courts operates. It may enact a statute creating a crime or repeal such a statute. The first enactment does not increase nor does the latter diminish the jurisdiction of a court. It merely is an exercise of the power of the Legislature to declare the public policy of the state and punish offenses against its sovereignty. Unless there is some other constitutional objection, such laws would not be invalid as interferences with the jurisdiction of the courts. When the Legislature makes peaceful picketing valid under certain prescribed circumstances, it leaves nothing for an injunction to operate upon. The provisions of such a law are substantive in character. They may or may not be unconstitutional on some other ground, but it is certain they are not unconstitutional upon the ground assigned.

[7] We conclude that defendant unions had standing under the act, although representing none of the members of their craft employed by plaintiff, and although there was no dispute between plaintiff and its employees, to be a disputant with plaintiff, and that unionization of plaintiff's store could constitute a proper subject for dispute. We further conclude that the act, so construed, is not repugnant to any constitutional provision.

[8] We have deferred until this time discussion of a

question that both briefs assume to be necessarily answered by the determination heretofore made, but which we are satisfied is separate and distinct. Plaintiff contends that for it to require its employees to name defendants as their bargaining agents would violate the right of the employees to be free from its coercion in such matters, and that any picketing of plaintiff, however peaceful, constitutes pressure upon it to compel the doing of an illegal act or at least one that is contrary to public policy. It seems that is contrary to public policy. It seems to us that, even if this contention be sound, it does not militate against the propositions heretofore decided. Thus, it coming to the attention of a union that a particular employer (1) is paying extremely low wages to workers in the craft it represents, or (2) is insisting upon unduly long hours of labor, or (3) is refusing to hire union labor or to permit members of a union to work for him, it could make demands for changes and, upon refusal of these demands, be considered a party to a labor dispute and entitled to the exemptions of the act. On the other hand, regardless of its standing to become a disputant, the terms of the act cannot be stretched to permit a union to enforce by picketing demands which the employer may not lawfully accede to. It is plaintiff's position that this is in effect what defendants are permitted to do by the terms of the judgment; that the very act under which defendant claims its rights to picket prohibits coercion of the employees by the employer or any interference by him with the right of the employees freely to organize and select their agencies for collective bargaining. Defendants contend that the act evidences a purpose to foster organizations of employees and recognizes the helplessness of the individual employee; that to grant plaintiff's view is to outlaw all closed shop agreements and thus to restrict rather than to extend the rights of workmen and organized labor, contrary to the plainly evidenced intent of the act.

The question has given us much concern, and its solution is attended with very substantial difficulties. Plain-

tiff stands indifferent, willing to permit the union to persuade his men to join a union, willing to bargain with the union if it succeeds in winning the allegiance of the men, and, with its employees' consent, to sign contracts vesting in the union the right to represent the men. It declines, however, to coerce its employees in any respect. May it be subjected to picketing to compel it to insist, as a condition of continued employment, that its men consent to the designation of defendant unions as their bargaining agents?

If the above analysis is correct, the question is whether in this case defendants are seeking by such pressure as is involved in peaceful picketing to compel plaintiff to violate the rights of free association and collective bargaining which this court has held to be vested in the employees under section 103.51. Trustees of Wisconsin State Federation of Labor v. Simplex Shoe Mfg. Co., 215 Wis. 623, 256 N. W. 56.

[9] Section 103.51, Stats., which is entitled "Public Policy as to Collective Bargaining," reads as follows:

> "In the interpretation and application of sections 103.51 to 103.63 the public policy of this state is declared as follows:
>
> "Negotiation of terms and conditions of labor should result from voluntary agreement between employer and employes. Governmental authority has permitted and encouraged employers to organize in the corporate and other forms of capital control. In dealing with such employers, the individual unorganized worker is helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment. Therefore it is necessary that the individual workmen have full freedom of association, self-organization, and the designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint or coercion of employers of labor, or their agents, in the designation of such representa-

tives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."

Plaintiff naturally lays much stress upon the requirement that a negotiation of terms and conditions of labor should result from voluntary agreement between employer and employees, and that portion of the section which confers upon the individual workman full freedom of association and designation of representatives of his own choosing free from interference, restraint, or coercion by his employer. Defendants' contention is that this section was for the purpose (1) of encouraging associations of workmen to conduct collective bargaining; (2) to insure that such associations would be free from the dominance or control by employers to the end that workmen might be able to bring to bear in their negotiations with employers whatever weight or power results from collective or group effort. We are of the opinion that defendants' contention with respect to the general purpose of the act is sound. The futility of individual negotiation is expressly recognized, and the purpose of the act is to encourage group negotiation as a substitute and to protect the latter activity from dominance or coercion by the employer.

There is nothing in the act to indicate that existing closed shop agreements are intended to be invalidated or future agreements of this character prohibited unless such intention is to be implied from the requirement that employers practice no restraint or coercion upon the exercise by the employees of their right to associate and to name their bargaining agents. See 44 Yale L. J. 1067; 48 Harv. Law Review, 656. On the other hand, it is plain that the act does not require the employees to adopt any specified form of organization or to affiliate with existing outside labor organizations. We are faced with the seeming contradiction that while the act contains no expressed intention to outlaw closed shop agreements, it is expressly provided that activities of employees in the direction of association and organization for bargaining purposes shall

not be subject to coercion or interference by employers. The conclusion that the latter was one of the principal purposes of this act as well as the Norris-LaGuardia Act is indicated not merely by the text of the acts, but by the practical construction given substantially similar provisions of section 7 (a) of the National Industrial Recovery Act (15 U. S. C. A. § 707 (a)) by the National Labor Board. See 4 George Washington Law Review, 433.

The question is not easy of solution. Defendant contends that the purpose of the act is merely to prevent dominance by an employer of the organization of his employees and that, so long as he exacts as a condition of continued employment membership in an outside union over which he has no control, the purposes of the act are promoted rather than defeated. While much may be said for this view, it is extremely difficult to reconcile with the full freedom of association and designation of representatives which the act expressly secures to the men. It may well be that if, when negotiations for a closed shop are initiated between an outside labor union and an employer, the employees have already exercised, free from their employer's domination, or are in the process of so exercising their right to organize and to select representatives for collective bargaining, the employer may not insist that another or different plan of organization be adopted or that other representatives be chosen. If he may not, then no pressure may be brought to bear upon him by an outside union to compel such action. Whether pressure of the sort authorized by the act may be brought upon the employees by the outside union, it is unnecessary to determine, although in this connection it may be significant that neither the Wisconsin Labor Code nor the Norris-LaGuardia Act contain any provisions expressly inhibiting labor organizations from exercising the coercion and domination prohibited to employers. See 47 Harv. L. Rev. 117; 21 Cornell Law Quarterly Rev. 640.

We do not find it necessary finally to determine the difficult questions above set forth. Assuming that defendant's

contentions with respect to them be rejected and the rule most favorable to plaintiffs established, the result in this case would not be affected.

[10] The law plainly protects not the unorganized individuals constituting the employees, but the right of employees to act in groups or associations. It deals with the collective effort of employees to better their conditions, and it is only their activities in this direction that are brought within the protection of the statute. The rights of employees not to organize and not to name bargaining agents is neither fostered nor protected. Where the employees have neither organized and named their bargaining representatives nor taken any steps so to organize, we see nothing in the act which prohibits the employer selecting their bargaining agent by contract with a labor union which is not subject to his domination. Such a step promotes rather than defeats the purpose of the code.

This is the situation presented by the facts in this case. The employees involved in the crafts represented by defendant unions were not organized, had taken no steps to organize, and did not desire so to do. The mere refusal by the employees to join defendants' unions or to assent to a contract making the unions their bargaining representatives did not constitute the exercise of steps leading to organization of the employees for bargaining purposes. What happened was that the men simply declined or neglected to organize or at least had taken no steps in that direction. In such a situation, plaintiff could exercise the right that it always had, in the absence of statute, to establish whatever conditions for continued employment its judgment might dictate with the one exception that it could not insist upon a type of organization which preserved to it a position of dominance.

Thus, we conclude that such peaceful picketing as was authorized by the court in this case cannot be said to have had as its objective pressure upon the employer to do an unlawful act by interfering with the rights of his employees to carry on such measures of organization and col-

lective bargaining as they might freely decide upon. While plaintiff might lawfully decline to enter into such a contract as defendants proposed, we think that when it did so it was in dispute with the union, and the latter might adopt such measures as are sanctioned by the labor code.

[11] There being no motion to review, there is no occasion to comment on the character and extent of picketing permitted under the code further than to say that the activities of defendants permitted by the judgment do not include violence, intimidation, misrepresentation, or obstruction of access by customers and appear to be well within the range of lawful activities as defined by the code.

Judgment affirmed.

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WISCONSIN LABOR CODE.

(Wisconsin Statutes of 1935.)

103.51 **Public policy as to collective bargaining.** In the interpretation and application of sections 103.51 to 103.63 the public policy of this state is declared as follows:

Negotiation of terms and conditions of labor should result from voluntary agreement between employer and employes. Governmental authority has permitted and encouraged employers to organize in the corporate and other forms of capital control. In dealing with such employers, the individual unorganized worker is helpless to exercise actual liberty of contract and protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment. Therefore it is necessary that the individual workman have full freedom of association, self-organization, and the designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.

103.52 **"Yellow-dog" contracts.** Every undertaking or promise made after the taking effect of this action, whether written or oral, express or implied, between any employe or prospective employe and his employer, prospective employer or any other individual, firm, company, association, or corporation, whereby

(1) Either party thereto undertakes or promises to join or to remain a member of some specific labor organization or organizations or to join or remain a member of some specific employer organization or any employer organization or organizations; or

(2) Either party thereto undertakes or promises not to join or not to remain a member of some specific labor organization or any labor organization or organizations, or of some specific employer organization or any employer organization or organizations; or

(3) Either party thereto undertakes or promises that he will withdraw from an employment relation in the event that he joins or remains a member of some specific labor organization or any labor organization or organizations, or of some specific employer organization or any employer organization or organizations;

Is hereby declared to be contrary to public policy and shall not afford any basis for the granting of legal or equitable relief by any court against a party to such undertaking or promise, or against any other persons who may advise, urge or induce, without fraud, violence, or threat thereof, either party thereto to act in disregard of such undertaking or promise. This section in its entirety is supplemental to and of subsection (1) of section 103.46 of the statutes.

103.53 **Lawful conduct in labor disputes.** (1) The following acts, whether performed singly or in concert, shall be legal:

(a) Ceasing or refusing to perform any work or to remain in any relation of employment regardless of any promise, undertaking, contract or agreement in violation of the public policy declared in section 103.52;

(b) Becoming or remaining a member of any labor organization or of any employer organization, regardless of any such undertaking or promise as is described in section 103.52;

(c) Paying or giving to, any person any strike or unemployment benefits or insurance or other moneys or things of value;

(d) By all lawful means aiding any person who is being

proceeded against in, or is prosecuting any action or suit in any court of the United States or of any state;

(e) Giving publicity to and obtaining or communicating information regarding the existence of, or the facts involved in, any dispute, whether by advertising, speaking, patrolling any public street or any place where any person or persons may lawfully be, without intimidation or coercion, or by any other method not involving fraud, violence, breach of the peace, or threat thereof;

(f) Ceasing to patronize or to employ any person or persons, but nothing herein shall be construed to legalize a secondary boycott;

(g) Assembling peaceably to do or to organize to do any of the acts heretofore specified or to promote lawful interests;

(h) Advising or notifying any person or persons of an intention to do any of the acts heretofore specified;

(i) Agreeing with other persons to do or not to do any of the acts heretofore specified;

(j) Advising, urging, or inducing without fraud, violence, or threat thereof, others to do the acts heretofore specified, regardless of any such undertaking or promise as is described in section 103.52; and

(k) Doing in concert any or all of the acts heretofore specified shall not constitute an unlawful combination or conspiracy;

(l) Peaceful picketing or patrolling, whether engaged in singly or in numbers, shall be legal.

(2) No court, nor any judge or judges thereof, shall have jurisdiction to issue any restraining order or temporary or permanent injunction which, in specific or general terms, prohibits any person or persons from doing, whether singly or in concert, any of the foregoing acts.

103.54 **Responsibility for unlawful acts.** No officer or member of any association or organization, and no asso-

ciation or organization participating or interested in a labor dispute (as these terms are defined in section 103.62) shall be held responsible or liable in any civil action at law or suit in equity, or in any criminal prosecution, for the unlawful acts of individual officers, members, or agents, except upon proof by a preponderance of the evidence and without the aid of any presumptions of law or fact, both of (a) the doing of such acts by persons who are officers, members or agents of any such association or organization, and (b) actual participation in, or actual authorization of, such acts, or ratification of such acts after actual knowledge thereof by such association or organization.

103.55 **Public policy as to labor litigation.** In the interpretation and application of sections 103.56 to 103.59, the public policy of this state is declared to be:

Equity procedure that permits a complaining party to obtain sweeping injunctive relief that is not preceded by or conditioned upon notice to and hearing of the responding party or parties, or that issues after hearing based upon written affidavits alone and not wholly or in part upon examination, confrontation and cross-examination of witnesses in open court, is peculiarly subject to abuse in labor litigation for the reasons that

(1) The status quo cannot be maintained but is necessarily altered by the injunction;

(2) Determination of issues of veracity and of probability of fact from affidavits of the opposing parties that are contradictory and, under the circumstances, untrustworthy rather than from oral examination in open court is subject to grave error;

(3) Error in issuing the injunctive relief is usually irreparable to the opposing party; and

(4) Delay incident to the normal course of appellate practice frequently makes ultimate correction of error in law or in fact unavailing in the particular case.

103.56 **Injunctions: conditions of issuance; restraining orders.** (1) No court nor any judge or judges thereof shall have jurisdiction to issue a temporary or permanent injunction in any case involving or growing out of a labor dispute, as defined in section 103.62, except after hearing the testimony of witnesses in open court (with opportunity for cross-examination) in support of the allegations of a complaint made under oath, and testimony in opposition thereto, if offered, and except after findings of all the following facts by the court or judge or judges thereof:

(a) That unlawful acts have been threatened or committed and will be executed or continued unless restrained.

(b) That substantial and irreparable injury to complainant's property will follow unless the relief requested is granted;

(c) That as to each item of relief granted greater injury will be inflicted upon complainant by the denial thereof than will be inflicted upon defendants by the granting thereof;

(d) That the relief to be granted does not violate the provisions of section 103.53;

(e) That complainant has no adequate remedy at law; and

(f) That the public officers charged with the duty to protect complainant's property have failed or are unable to furnish adequate protection.

(2) Such hearing shall be held after due and personal notice thereof has been given, in such manner as the court shall direct, to all known persons against whom relief is sought, and also to those public officers charged with the duty to protect complainant's property. Provided, however, that if a complainant shall also allege that unless a temporary restraining order shall be issued before such hearing may be had, a substantial and irreparable injury to complainant's property will be unavoidable, such a tem-

porary restraining order may be granted upon the expiration of such reasonable notice of application therefor as the court may direct by order to show cause, but in no case less than forty-eight hours.

(3) Such order to show cause shall be served upon such party or parties as are sought to be restrained and as shall be specified in said order, and then only upon testimony under oath, or in the discretion of the court, upon affidavits, sufficient, if sustained, to justify the court in issuing a temporary injunction upon a hearing as herein provided for.

(4) Such a temporary restraining order shall be effective for no longer than five days, and at the expiration of said five days shall become void and not subject to renewal or extension, provided, however, that if the hearing for a temporary injunction shall have been begun before the expiration of the said five days the restraining order may in the court's discretion be continued until a decision is reached upon the issuance of the temporary injunction.

(5) No temporary restraining order or temporary injunction shall be issued except on condition that complainant shall first file an undertaking with adequate security sufficient to recompense those enjoined for any loss, expense, or damage caused by the improvident or erroneous issuance of such order or injunction, including all reasonable costs (together with a reasonable attorney's fee) and expense against the order or against the granting of any injunctive relief sought in the same proceeding and subsequently denied by the court.

(6) The undertaking herein mentioned shall be understood to signify an agreement entered into by the complainant and the surety upon which a decree may be rendered in the same suit or proceeding against said complainant and surety, the said complainant and surety submitting themselves to the jurisdiction of the court for that purpose. But nothing herein contained shall deprive any

party having a claim or cause of action under or upon such undertaking from electing to pursue his ordinary remedy by suit at law or in equity.

103.57 **Clean hands doctrine.** No restraining order or injunctive relief shall be granted to any complainant who has failed to comply with any legal obligation which is involved in the labor dispute in question, or who has failed to make every reasonable effort to settle such dispute either by negotiation or with the aid of any available machinery of governmental mediation or voluntary arbitration, but nothing herein contained shall be deemed to require the court to await the action of any such tribunal if irreparable injury is threatened.

103.58 **Injunctions: contents.** Except as provided in section 103.56, no restraining order or temporary or permanent injunction shall be granted in a case involving or growing out of a labor dispute, except on the basis of findings of fact made and filed by the court in the record of the case prior to the issuance of such restraining order or injunction; and every restraining order or injunction granted in a case involving or growing out of a labor dispute shall include only a prohibition of such specific act or acts as may be expressly complained of in the bill of complaint or petition filed in such case and expressly included in said findings of fact made and filed by the court as provided herein; and shall be binding only upon the parties to the suit, their agents, servants, employes and attorneys, or those in active concert and participation with them, and who shall by personal service or otherwise have received actual notice of the same.

103.59 **Injunctions: appeals.** Whenever any court or judge or judges thereof shall issue or deny any temporary injunction in a case involving or growing out of a labor dispute, the court shall, upon the request of any party to the proceedings, and on his filing the usual bond for costs,

forthwith certify the entire record of the case, including a transcript of the evidence taken, to the appropriate appellate court for its review. Upon the filing of such record in the appropriate appellate court the appeal shall be heard with the greatest possible expedition, giving the proceeding precedence over all other matters except older matters of the same character.

103.60 **Contempt cases.** In all cases where a person shall be charged with civil or criminal contempt for violation of a restraining order or injunction issued by a court or judge or judges thereof, the accused shall enjoy:

(1) The rights as to admission to bail that are accorded to persons accused of crime.

(2) The right to be notified of the accusation and a reasonable time to make a defense, provided the alleged contempt is not committed in the immediate view or presence of the court.

(3) Upon demand, the right to a speedy and public trial by an impartial jury of the county wherein the contempt shall have been committed, provided that this requirement shall not be construed to apply to contempts committed in the presence of the court or so near thereto as to interfere directly with the administration of justice or to apply to the misbehavior, misconduct, or disobedience of any officer of the court in respect to the writs, orders, or process of the court. All contempt proceedings, whether civil or criminal, brought for the alleged violation of any such restraining order or injunction, are, and hereby are declared to be independent, original, special proceedings, and shall require a unanimous finding of the jury.

(4) The right to file with the court a demand for the retirement of the judge sitting in the proceeding, upon an affidavit of prejudice being filed as is now provided by law in other cases. Upon the filing of any such affidavit, the judge shall thereupon proceed no further, but another judge shall be designated as is now provided for in other

cases. The affidavit shall be filed prior to the hearing in the contempt proceeding.

103.61 **Punishment for contempt.** Punishment for a contempt, specified in section 103.60, may be by fine, not exceeding twenty-five dollars, or by imprisonment not exceeding ten days, in the jail of the county where the court is sitting, or both, in the discretion of the court. Where a person is committed to jail, for the nonpayment of such a fine, he must be discharged at the expiration of fifteen days; but where he is also committed for a definite time, the fifteen days must be computed from the expiration of the definite time.

103.62 **Definitions.** When used in sections 103.51 to 103.63, and for the purposes of these sections:

(1) A case shall be held to involve or to grow out of a labor dispute when the case involves persons who are engaged in a single industry, trade, craft, or occupation; or who are employes of one employer; or who are members of the same or an affiliated organization of employers or employes; whether such dispute is (1) between one or more employers or associations of employers and one or more employes or associations of employes; (2) between one or more employers or associations of employers and one or more employers or associations of employers; or (3) between one or more employes or associations of employes and one or more employes or associations of employes; or when the case involves any conflicting or competing interests in a "labor dispute" (as defined in subsection (3)) of "persons participating or interested" therein (as defined in subsection (2)).

(2) A person or association shall be held to be a person participating or interested in a labor dispute if relief is sought against him or it and if he or it is engaged in the industry, trade, craft, or occupation in which such dispute occurs, or is a member, officer, or agent of any asso-

ciation of employers or employes engaged in such industry, trade, craft, or occupation.

(3) The term "labor dispute" includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, or concerning employment relations, or any other controversy arising out of the respective interests of employer and employe, regardless of whether or not the disputants stand in the proximate relation of employer and employe.

103.63 **Severability of provisions.** If any provision of sections 103.51 to 103.63 or the applications thereof to any person or circumstance is held invalid, the remainder of these sections and the application of such provisions to other persons or circumstances shall not be affected thereby.

72d Congress } HOUSE OF REPRESENTATIVES { Report
1st Session } { No. 669

DEFINE AND LIMIT THE JURISDICTION OF COURTS SITTING IN EQUITY

March 2, 1932.—Referred to the House Calendar and ordered to be printed

Mr. La Guardia, from the Committee on the Judiciary, submitted the following

REPORT

[To accompany H. R. 5315]

The Committee on the Judiciary, to whom was referred the bill (H. R. 5315) to amend the Judicial Code and to define and limit the jurisdiction of courts sitting in equity, and for other purposes, after hearing (serial 3) and consideration, reports the same favorably with amendments and recommends that the bill as amended do pass.

The committee amendments are as follows:

Page 1, line 7, strike out the word "of" following the word "order" and insert in lieu thereof the word "or".

Page 3, line 3, after the word "enforceable" add the following words "in any court of the United States".

Page 3, line 5, after the word "any" insert the word "such", and in the same line strike out the words "of the United States".

Page 3, line 24, after the word "in" add the words "any case" and strike out the word "cases".

Page 5, line 15, strike out the words "and no association or organization".

LIMIT THE JURISDICTION OF COURTS SITTING IN EQUITY

Page 5, line 21, strike out the period after the word "thereof" and insert the following words: "and the liability of any such association or organization for unlawful acts of its members shall be similarly limited" followed by a period.

Page 6, line 5, after the word "been" insert the following words: "threatened or".

Page 6, line 6, after the word "restrained" strike out the semicolon and insert the following words: "but no injunction or temporary restraining order shall be issued on account of any threat or unlawful act except against the person or persons, association or organization making the threat or committing the unlawful act or who actually authorized it or ratified it after actual knowledge thereof" to be followed by a semicolon.

Page 7, line 9, after the word "security" insert the words "in an amount to be fixed by the court".

Page 7, line 21, after the first word "surety" add the following words: "upon a hearing to assess damages of which hearing complainant and surety shall have reasonable notice".

Page 9, line 6, after the word "cases" insert the words "arising under this act in which" and strike out the word "where".

Page 9, line 7, strike out the words "indirect" and "for violation of a restrain-".

Page 9, line 8, strike out the words "ing order or injunction issued by" and insert in lieu thereof the word "of".

Page 9, line 12, strike out the word "requirement" and insert in lieu thereof the word "right", and in lines 12 and 13 strike out the words "be construed to".

Page 9, line 19, strike out the words "is authorized to" and insert in lieu thereof the word "may".

Page 9, line 25, strike out the word "provided" and insert in lieu thereof the words "is provided by law" followed by a period.

Page 10, strike out all of line 1 and line 2 down to and including the word "Code".

Page 11, line 11, strike out the word "and" and insert in lieu thereof the word "or" and strike out the words "or concerning".

Page 11, strike out all of line 12 and all of line 13 down to and including the word "employee".

Page 11, line 20, strike out the word "provisions" and insert in lieu thereof the word "part", and strike out, in lines 20 and 21, the words "or the application thereof to any person or circumstances".

Page 11, line 21, after the word "held" insert the words "unconstitutional or otherwise".

Page 11, line 22, strike out the word "remainder" and insert in lieu thereof the words "remaining part", and in lines 22 and 23 strike out the words "and the application of such provisions to other persons or circumstances".

This bill is the so-called anti-injunction bill. It is the outgrowth of years of agitation in the Congress for restriction upon the powers of Federal equity courts in the issuance of injunctions in labor disputes. Hearings have been held by congressional committees over a period of years and the facts adduced have brought about an almost unanimity of opinion that such powers of the Federal courts have been exercised to the detriment of the public welfare and should be curbed.

The questions are sociologic and economic as well as legal and jurisdictional.

The limitation of the jurisdiction of Federal courts to issue injunctions in labor disputes has been a subject of public discussion for many years. It is fair to say that

public sentiment on the subject has reached the conclusion that some such limitation is absolutely necessary. Both of the great political parties in their last national platforms have promised remedial legislation upon the subject. The last Republican National Convention at Kansas City adopted a plank on the subject, as follows:

> The party favors freedom in wage contracts, the right of collective bargaining by free and responsible agents of their own choosing, which develops and maintains that purposeful cooperation which gains its chief incentive through voluntary agreement.
>
> We believe that injunctions in labor disputes have in some instances been abused and have given rise to a serious question for legislation.

Following this, the last Democratic National Convention at Houston, Tex., in its platform, made the following promises:

> (*a*) We favor the principle of collective bargaining and the Democratic principle that organized labor should choose its own representatives without coercion or interference.
>
> (*b*) Labor is not a commodity. Human rights must be safeguarded. Labor should be exempt from the operation of antitrust laws.
>
> (*c*) We recognize that legislative and other investigations have shown the existence of grave abuse in the issuance of injunctions in labor disputes. No injunctions should be granted in labor disputes except upon proof of threatened irreparable injury and after notice and hearing, and the injunction should be confined to those acts which do directly threaten irreparable injury. The expressed purpose of representatives of capital, labor, and the bar to devise a plan for the elimination of the present evils with respect to injunctions must be supported and legislation designed to accomplish these ends formulated and passed.

The purpose of the bill is to protect the rights of labor

in the same manner the Congress intended when it enacted the Clayton Act, October 15, 1914 (38 Stat. L., 738), which act, by reason of its construction and application by the Federal courts, is ineffectual to accomplish the congressional intent.

Section 1: Section 1 provides that no United States court shall have jurisdiction to issue an injunction in a case growing out of a labor dispute except in strict conformity with the provisions of the act, and further that no such injunction shall be issued contrary to the public policy declared in the act.

The Constitution of the United States in Article III, section 1, provides:

> The judicial power of the United States shall be vested in one Supreme Court and in such inferior courts as the Congress may from time to time ordain and establish.

The provisions of the bill are expressly limited (sec. 13 (d)) to courts whose jurisdiction has been or may be conferred by the Congress, under the foregoing provision of the Constitution. The Congress having the power to establish, and confer jurisdiction upon, the courts in question, it can not be questioned that it has the power to restrict or curtail the exercise of their powers, as proposed in this bill. The Supreme Court of the United States has clearly recognized that this is the law in Kline *v.* Burke Construction Co. (260 U. S. 226, 234), (1922), wherein the court says that—

> Only the jurisdiction of the Supreme Court is derived directly from the Constitution. Every other court created by the General Government derives its jurisdiction wholly from the authority of Congress. *That body may give, withhold, or restrict such jurisdiction at its discretion* provided it be not extended beyond the boundaries fixed by the Constitution. (Italics supplied.)

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This case involved the jurisdiction of the United States District Court in cases depending upon diverse citizenship; and the Court continued (p. 234) as follows:

> The Constitution simply gives to the inferior courts the capacity to take jurisdiction in the enumerated cases, but it requires an act of Congress to confer it. (Nashville *v.* Cooper, 6 Wall. 247, 252, 18 L. ed. 851, 852.) And the jurisdiction, having been conferred, may, at the will of Congress, be taken away in whole or in part; and, if withdrawn without a saving clause, all pending cases, though cognizable when commenced, must fall.

Concerning the so-called inherent power of the courts to punish for contempt, the following is the state of the law:

The judiciary act of September 24, 1789, creating United States district courts, conferred upon them the power to punish for contempt in the following language:

> The said courts shall have power to impose and administer all necessary oaths, and to punish, by fine or imprisonment at the discretion of the court, contempts of their authority.

As early as 1831 the Congress limited this power by the act of March 2, 1831, as follows:

> The power of the several courts of the United States to issue attachments and inflict summary punishments for contempts of court shall not be construed to extend to any case except the misbehavior of any person or persons in the presence of the said courts, or so near thereto as to obstruct the administration of justice, the misbehavior of any of the officers of the said courts in their official transactions, and the disobedience or resistance by any officer of the said courts, party, juror, witness or any other person or persons to any lawful writ, process, order, rule, decree, or command of the said courts (4 Stat. L. 487)—

which is now section 385, title 28, chapter 10, United States Code:

> SEC. 385. The said courts shall have power to impose and administer all necessary oaths, and to punish, by fine or imprisonment, at the discretion of the court, contempts of their authority. Such power to punish contempts shall not be construed to extend to any cases except the misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice, the misbehavior of any of the officers of said courts in their official transactions, and the disobedience or resistance by any such officer, or by any party, juror, witness, or other person to any lawful writ, process, order, rule, decree, or command of the said courts.

Speaking of the act of March 2, 1831, the Supreme Court, in Ex parte Robinson (19 Wall., 505, 513), said:

> But the power has been limited and defined by the act of Congress of March 2, 1831. * * * It limits the power of these courts in this respect to three classes of cases: 1, where there has been misbehavior of a person in the presence of the courts, or so near thereto as to obstruct the administration of justice; 2, where there has been misbehavior of any officer of the courts in his official transactions; and, 3, where there has been disobedience or resistance by any officer, party, juror, witness or other person, to any lawful writ, process, order, rule, decree, or command of the court. As thus seen, the power of these courts in the punishment of contempts can only be exercised to insure order and decorum in their presence, to secure faithfulness on the part of their officers in their official transactions, and to enforce obedience to their lawful orders, judgments, and processes.

Section 21, of the Clayton Act, supra (sec. 386, title 28, U. S. C.) is as follows:

> SEC. 21. That any person who shall willfully disobey any lawful writ, process, order, rule, decree, or

> command of any district court of the United States or any court of the District of Columbia by doing any act or thing therein, or thereby forbidden to be done by him, if the act or thing so done by him be of such character as to constitute also a criminal offense under any statute of the United States, or under the laws of any State in which the act was committed, shall be proceeded against for his said contempt as hereinafter provided.

Sections 22, 23, and 24 of the Clayton Act (now secs. 387, 388, and 389, title 28, U. S. C.) provide for procedure in cases of contempt and grant to the accused a trial by jury; with the exception of contempts committed in the presence of the court, etc., as stated in section 385, title 28, United States Code, supra.

The Supreme Court reversing the Circuit Court of Appeals for the Sixth Circuit sustained the constitutionality of the provisions of the Clayton Act, now embodied in the United States Code, supra, in the case of Michaelson *v.* U. S. ex rel. C., St. P., M. & O. R. Co. (266 U. S. 42, 69 L. Ed. 162).

This case involved proceedings, under the Clayton Act of October 15, 1914, for contempt of certain striking railroad employees in violating an injunction against picketing, etc., entered in an equity proceeding. Upon answer and return, the defendants applied for a jury trial under section 22 of the Clayton Act; this request was refused and the court proceeded without a jury; defendants were adjudged guilty of contempt and sentenced. The Circuit Court of Appeals affirmed this judgment, and upon writ of certiorari the Supreme Court considered the constitutionality of sections 21 and 22 of the Clayton Act, and held they were constitutional and that the provision for a jury trial in certain specified kinds of contempt was mandatory and not permissive.

In discussing the statute, and the so-called inherent power of courts to punish for contempt, the court said:

> It is contended that the statute materially interferes with the inherent power of the courts, and is therefore invalid. That the power to punish for contempts is inherent in all courts has been many times decided and may be regarded as settled law. It is essential to the administration of justice. The courts of the United States, when called into existence and vested with jurisdiction over any subject, at once become possessed of the power. So far as the inferior Federal courts are concerned however, it is not beyond the authority of Congress; but the attributes which inhere in that power and are inseparable from it can neither be abrogated nor rendered practically inoperative. That it may be regulated within limits not precisely defined may not be doubted. The statute now under review is of the latter character. It is of narrow scope, dealing with the single class where the act or thing constituting the contempt is also a crime in the ordinary sense. It does not interfere with the power to deal summarily with contempts committed in the presence of the court, or so near thereto as to obstruct the administration of justice, and is, in express terms, carefully limited to the cases of contempt specifically defined. But the simple question presented is whether Congress may require a trial by jury upon the demand of the accused in an independent proceeding at law for a criminal contempt which is also a crime. In criminal contempts, as in criminal cases, the presumption of innocence obtains. Proof of guilt must be beyond reasonable doubt, and the defendant may not be compelled to be a witness against himself. (Gompers *v.* Buck's Stove & Range Co., supra, 221 U. S. 418, 55 L. Ed. 797, p. 444.) The fundamental characteristics of both are the same. Contempts of the kind within the terms of the Statute partake of the nature of crimes in all essential particulars. The only substantial difference between such a proceeding as we have here, and a criminal prosecution by indictment or information, is that in the latter the act complained of is the vio-

lation of a law, and, in the former, the violation of a decree. In the case of the latter, the accused has a constitutional right of trial by jury, while in the former he has not. The statutory extension of this constitutional right to a class of contempts which are properly described as "criminal offenses" does not, in our opinion, invade the powers of the courts as intended by the Constitution, or violate that instrument in any other way.

Section 2: Section 2 sets forth the public policy of the United States for the guidance of the courts in their interpretation of this proposed law.

Congress has heretofore declared the public policy of the United States for the guidance of the courts. Previous acts of Congress containing wide declarations of policy may be found in the following statutes: Packers and stockyards act, 1921, Stafford *v.* Wallace (258 U. S. 495); transportation act of 1920, Dayton Goose Creek Ry. Co. *v.* United States (263 U. S. 456); Railway labor act of 1926, T. & N. O. Ry. *v.* Brotherhood of Railway Clerks (281 U. S. 548); grain futures act (title 7, U. S. C., sec. 5 et seq.).

In the Clayton Act (title 29, U. S. C., sec. 52), Congress read into the law the declaration of policy that "The labor of a human being is not a commodity or article of commerce."

This statement of public policy as contained in the bill is in accordance with the general trend of enlightened public opinion and finds adequate support in the opinions of the Supreme Court of the United States. For example, in the case of American Steel Foundries *v.* Tri-City Central Trades Council (257 U. S. 184), the Supreme Court, in an opinion by the late Mr. Chief Justice Taft, uses language of marked similarity with the foregoing statement of public policy, as follows:

Labor unions are recognized by the Clayton Act as

> legal when instituted for mutual help and lawfully carrying out their legitimate objects. They have long been thus recognized by the courts. They were organized out of the necessities of the situation. A single employee was helpless in dealing with an employer. He was dependent ordinarily on his daily wage for the maintenance of himself and family. If the employer refused to pay him the wages that he thought fair, he was nevertheless unable to leave the employ and to resist arbitrary and unfair treatment. Union was essential to give laborers an opportunity to deal on equality with their employer. They united to exert influence upon him and to leave him in a body, in order, by this inconvenience, to induce him to make better terms with him. They were withholding their labor of economic value to make him pay what they thought it was worth. The right to combine for such a lawful purpose has, in many years, not been denied by any court. The strike became a lawful instrument in a lawful economic struggle or competition between employer and employees as to the share or division between them of the joint product of labor and capital. To render this combination at all effective, employees must make their combination extend beyond one shop. It is helpful to have as many as may be in the same trade in the same community united, because, in the competition between employers, they are bound to be affected by the standard of wages of their trade in the neighborhood.

The inclusion of a statement of public policy in the act itself is unobjectionable. It tends to remove doubt as to the purpose and intention of the Congress and is thereby of assistance to the courts in determining questions of interpretation. Moreover, it is the place to look for a statement of the public policy involved, because, as said by the Supreme Court, the public policy of a State must be ascertained from its laws. (Vidal *v.* Girard, 2 Howard 127; License Tax Cases, 5 Wall. 462; St. Louis Mining & M. Co. *v.* Montana Mining Co., 171 U. S. 650.)

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Furthermore, the Congress has heretofore stated in legislation the public policy in similar manner. For example, as late as 1925 the Congress declared by statute what should be the true policy in rate making to be pursued by the Interstate Commerce Commission, to the effect that conditions which at any given time prevail in our several industries should be considered in so far as it is legally possible so to do, to the end that commodities may freely move (43 Stat. L., 80).

Section 3: Section 3 is designed to outlaw the so-called yellow-dog contract. This section provides that any promise which is described therein or which conflicts with the public policy declared in section 2, is contrary to public policy and shall be unenforceable in any court of the United States. This section includes specifically a promise contained in any agreement of hiring whereby either party promises not to join a labor organization or employer organization, or promises to withdraw from an employment relation in the event he joins any such organization.

This section in no wise is concerned with interstate commerce or the application of the Sherman Act and its amendments, but the Federal courts obtain jurisdiction in cases involving such contracts by virtue of diversity of citizenship; and injunctions have been issued in the Federal courts on the basis of such contracts of employment.

It is easy to say that an employee is not compelled to accept employment and that an employer has the right to make such conditions as he may see fit surrounding the employment. But, aside from the necessity of providing support for himself and family always immediately confronting the workingman, and always materially diminishing his freedom of contract, the vice of such contracts, which are becoming alarmingly widespread, is that if they are carried to their ultimate conclusion, they would abolish

trade-unionism. Indeed that is undoubtedly their purpose, and the purpose of the organizations of employers opposing this bill. With this prospect in immediate view, upon the general adoption of the "yellow-dog" contract, the employee, as stated by the late Mr. Chief Justice Taft in the American Steel Foundries *v.* Tri-City C. C. case, supra, becomes "helpless in dealing with an employer"; and the "union," stated by the same authority as "essential to give laborers an opportunity to deal on equality with their employer," becomes a thing of the past.

Also, as stated in a more recent decision of the Supreme Court of the United States in the case of Texas & N. O. Railroad Co. *v.* Brotherhood of Railway and Steamship Clerks et al. (281 U. S. 548), the opinion being written by Mr. Chief Justice Hughes, "collective action would be a mockery," because collective action would be impossible so far as the employee is concerned by virtue of the necessity of signing the character of contract condemned, which prevents a man from joining with his fellows for collective action; and the statement contained in the same decision that "it has long been recognized that employees are entitled to organize for the purpose of securing the redress of grievances and to promote agreements with employers relating to rates of pay and conditions of work" would become an empty statement of historical fact.

Section 4: Section 4 provides that no United States court shall have jurisdiction to issue any injunction in any case involving a labor dispute to prohibit any person participating in such dispute from doing, whether singly or in concert, certain acts. These acts, briefly stated, which can not be enjoined, are the acts of ceasing to work, of becoming a member of a labor or employer organization, of paying any strike benefit, of aiding by lawful means persons participating in a labor dispute who are being proceeded against in a suit, of giving publicity to the facts

involved in a labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence, of assembling peaceably to act in promotion of the interests involved in a labor dispute, of advising any person of any intention to do any of these acts, of agreeing with other persons to do or not to do any of these acts, and of advising or urging without fraud or violence any of these acts regardless of any promise described in section 3 as hereinabove discussed.

These are the same character of acts which Congress in section 20 of the Clayton Act of October 15, 1914, sought to restrict from the operation of injunctions, but because of the interpretations placed by the courts on this section of the Clayton Act, the restrictions as contained therein have become more or less valueless to labor, and this section is intended by more specific language to overcome the qualifying effects of the decisions of the courts in this respect.

As an example of the manner in which the courts have interpreted this section of the Clayton Act which is responsible in part for this agitation for further legislation, we beg leave to cite the following cases.

In the case of Duplex Printing Press Co. *v.* Deering (254 U. S. 443), decided January 3, 1921, and being a six to three decision, the court held so far as pertinent to this particular discussion that this section of the Clayton Act provided a restriction upon the use of the injunctions in favor only of the immediate disputants and that other members of the union not standing in the proximate relation of employer and employee could be enjoined. Of course, it is fundamental that a strike is generally an idle gesture if confined only to the immediate disputants. This is intended to be remedied by the later provision in this act defining the meaning of the term, "person participating in a labor dispute," as to whom, as in the bill defined,

the courts are deprived of jurisdiction to issue injunctions in the specified instances set forth in this section.

In the case of the American Steel Foundries Co. *v.* Tri-City Central Trades Council, supra, there was a strike, and, of course, a picket line. There was practically no fraud or violence but the persistent giving of publicity to the facts involved in the dispute and the persistent advising of other persons without fraud or violence not to work for the employer. It was thought by the labor union that section 20 prohibited an injunction against such acts, but the Supreme Court held that such acts could be enjoined, and, therefore, the legislation proposed specifically restricts the courts in this respect unless the acts are accompanied by fraud or violence.

Section 5: This section provides that no United States court shall have jurisdiction to issue an injunction upon the ground that the persons participating in a labor dispute are engaging in an unlawful combination because of the doing in concert of the acts enumerated in section 4.

This section is included principally because many of the objectionable injunctions have been issued under the provisions of the antitrust laws, a necessary prerequisite for invoking the jurisdiction of which is a finding of the existence of a conspiracy or combination and without which no injunction could have been issued. For example, in the case of Bedford Cut Stone Co. *v.* Journeymen Stone Cutters' Association (274 U. S. 37), a 7 to 2 decision, where there was simply a rule by the association forbidding the members from working on the "unfair" stone of the complainant, the Supreme Court held that while it was lawful for members independently to refuse to work, when they refused in concert it became a combination, and when this unreasonably interfered with interstate commerce, it could be enjoined under the antitrust laws, resulting in the members being enjoined from refusing to work.

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Section 6: Section 6 provides that no employee of any organization and no organization participating in a labor dispute shall be held liable for the unlawful acts of individual members, except upon clear proof of actual authorization of such acts. This section speaks for itself and is desirable because both individuals and associations have been held liable for unlawful acts of overzealous members which acts were neither authorized nor ratified by the officer or association and were entirely without the scope of any authority committed by the officer or association of the offending member.

This provision does not affect the general law of agency, and it is necessary, under the circumstances, that the courts should know that Congress expects them not to hold officers or associations liable for the unlawful acts of a member without clear proof of actual participation in, or authorization of, any unlawful acts by the officer or association.

Section 7: This section is largely procedural and restrictive in character. The fairness of this section can not reasonably be disputed. It simply provides that no court shall have jurisdiction to issue an injunction in cases growing out of a labor dispute except after hearing the testimony of witnesses in open court with an opportunity for cross-examination and except after findings of fact by the court that unlawful acts have been committed and will be continued unless restrained, that irreparable injury to the complainant's property will follow, that as to each item of relief granted greater injury will be inflicted upon complainant by the denial of relief than will be inflicted upon defendants by the granting of relief, that complainant has no adequate remedy at law, and that the public officers charged with the duty of protecting complainant's property are unable or unwilling to furnish adequate protection.

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As will be noted, this is to prevent courts from issuing injunctions without making a finding of facts or where the unlawful acts are only threatened and where no substantial injury will follow, or where the injury always done by granting the relief is outweighed by the injury which would be inflicted by the denial of the relief, or where the public officers fail in their duty. The last provision is considered desirable, because it often happens that complainants rush into a Federal court and obtain an injunction the enforcement of which requires the court to consider and punish acts which are and ought to be, under our system of government, cognizable in the local tribunals. Our Federal courts already are congested with cases ordinarily cognizable in the local police courts, for example, the multitude of cases growing out of the prohibition act; and the granting of injunctions in many cases results in further congestion because the Federal courts are required to punish as contempts acts which are clearly local police-court matters.

The other provisions of this section hardly require any particular discussion, because they relate to the giving of notice, the length of time that a temporary restraining order shall be effective, the necessity for giving an undertaking with surety, the recompense for damages caused by the erroneous issuance of injunctions, and the like; all of which are generally considered necessary and reasonable when the extraordinary injunctive arm of the court is brought into play with the serious consequences of injury which the improvident issuance of an injunction frequently produces.

Section 8: This section prohibits any injunctive relief where the parties have failed to make every reasonable effort to settle, or have failed to comply with any obligation imposed by law, or have failed to invoke the aid of any available governmental machinery for mediation.

There can be no reasonable objection to this section because it is universally believed that disputes should be settled without resort to courts wherever possible, and the settlement of disputes by conciliation and arbitration, instead of by strikes, has become the rule rather than the exception.

Section 9: This section provides for findings of fact by the court which must be filed in the record of the case prior to the issuance of any injunctive order, and also provides that every injunctive order growing out of a labor dispute shall include only a prohibition of such specific acts as are expressly complained of and expressly included in the findings of fact made and filed by the court. This section is designed to require the court to find as a fact the existence of the acts enjoined and to prevent the enjoining of acts which are not complained of—clearly a deterrent to prevent the very harsh inclusive injunctive orders which are sometimes encountered and which go, by the embracive character of the decree, beyond allegations of the complaint or the facts adduced. This is clearly a reasonable restriction and unobjectionable.

Section 10: Section 10 provides for a speedy appeal, which is highly desirable in view of the extremely important issues which disputes of this kind involve. This section also gives these cases precedence in the appellate courts, and contains a provision somewhat similar to the provision of the statute in relation to the orders of the Interstate Commerce Commission, wherein it is provided that such proceedings shall be given precedence over all cases pending therein and shall be in every way expedited. (Sec. 21, title 15, U. S. C.)

Section 11: Section 11 provides that in cases in which a person shall be charged with contempt for violating injunctive orders the accused shall enjoy the right to a

speedy and public trial by a jury and also provides that this right shall not apply to contempts committed in the presence of the court or so near thereto as to interfere directly with the administration of justice, etc. That Congress has authority to provide for such a trial by jury has been upheld by the Supreme Court of the United States in the case of Michaelson *v.* U. S. ex rel. Chicago, St. Paul, Milwaukee & Omaha Railway Co. (266 U. S. 42), wherein the Supreme Court upheld a similar provision contained in section 21 of the Clayton Act.

Section 12: Section 12 provides that the defendant in any contempt proceeding may file with the court a demand for the retirement of the judge, if the contempt arises from an attack upon the conduct of said judge, and occurred other than in the presence of the court or so near thereto as to interfere directly with the administration of justice, and that upon filing of any such demand the judge is compelled to proceed no further. This is desirable because in some instances the presiding judges have had such pronounced views in labor disputes as to make impossible a fair and impartial hearing.

Section 13: Section 13 contains definitions which speak for themselves. It is hardly necessary to discuss them other than to say that these definitions include, as hereinabove stated, a definition of a person participating in a labor dispute which is broad enough to include others than the immediate disputants and thereby corrects the law as announced in the case of Duplex Printing Press Co. *v.* Deering, supra, wherein the Supreme Court reversed the circuit court of appeals and held that the inhibition of section 20 of the Clayton Act only related to those occupying the position of employer or employee and no others. The Supreme Court held to the same effect in the case of the American Steel Foundries Co. *v.* Tri-City Central Trades Council, supra.

The definitions, also, as above stated, limit the act to courts of the United States whose jurisdiction has been conferred or limited by act of Congress; that is to say, the inferior Federal courts.

Section 14: Section 14 is the usual provision to the effect that if any provision is held to be unconstitutional the remaining provisions shall not be affected thereby.

Section 15: Section 15 is the usual provision repealing acts in conflict with the provisions of this act.

States Having Enacted Anti-Injunction Legislation

In the following States legislation has been enacted governing the so-called "anti-injunction laws": Illinois, Kansas, Minnesota, Montana, New Jersey, North Dakota, Oregon, Pennsylvania, Utah, Washington, and Wisconsin.

In four of the States (Kansas, Minnesota, Pennsylvania, and Wisconsin) the law specifically provides that no injunction shall be issued without previous notice and an opportunity to be heard in open court. The State of Wisconsin, by chapter 376 of the acts of 1931, enacted a law defining the public policy of the State relative to collective bargaining. This act creates a new section relating to litigation growing out of the labor disputes and limiting the jurisdiction of courts sitting in equity. Section 268.23 concerns the conditions of issuance of injunctions and restraining orders. This section provides that no court shall have jurisdiction to issue an injunction in any case involving a labor dispute except after the testimony of witnesses in open court and with an opportunity for cross-examination.

On October 15, 1914, the Congress of the United States enacted the Clayton Act. Prior to the enactment of this law, several States had already enacted provisions similar to those contained in section 20 of the Clayton Act. The

following States have similar provisions: North Dakota, Oregon, Utah, Washington, and Wisconsin.

In addition to the above States which have enacted laws restricting the use of injunctions three other States (Illinois, Montana, and New Jersey) have enacted laws, although similar in many respects to the Clayton Act, differ in the exact wording of the law. (Credit for the research of State statutes on the subject is due the Bureau of Labor Statistics of the United States Department of Labor.)

In conclusion, it is repeated that the proposed bill is designed primarily as a practical means of remedying existing evils, and limitations are imposed upon the courts in that class of cases wherein these evils have grown up and become intolerable. This is a reasonable exercise of legislative power, and in order that the limitation may not be whittled away by refined definitions of what persons are to be regarded as legitimately involved in labor disputes, the bill undertakes specifically to designate those persons who are entitled to invoke the protections of the procedure required.

APPENDIX

Many Members of the House who are lawyers have given this subject a great deal of consideration, and have expressed their interest in the question of the power of Congress over equity jurisdiction of the Federal courts. A very interesting and scholarly memorandum was prepared on this subject by Prof. Felix Frankfurter, of the Harvard Law School, and coauthor of a recognized and authoritative work The Labor Injunction (Frankfurter & Greene, 1930), in which members will find not only the historical background but an abundance of judicial precedents and decisions on the subject.

Power of Congress Over Equity Jurisdiction of the Federal Courts

Congressional power over Federal equity jurisdiction is an aspect of Federal legislative power over the Federal judiciary generally. Accordingly this memorandum will treat the broader question first. But since it may be true in the law, if not elsewhere, that the whole does not always include its parts, consideration will then be given to the question whether there is anything in the nature of Federal equity jurisdiction which clothes it with special immunities.

A. **Congressional power over the Federal courts generally.**—The provisions of Article III, section 2 of the Constitution, defining the scope of "the judicial power," are not self-executing. Section 1 of the same article provides:

> The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish.

The extent to which the judicial power shall be vested in such inferior courts rests with Congress, which brought them into being. There has never been a time when the full limit of Federal judicial power has been given to the lower Federal courts. Not until 1875, except for the 1-year existence of the act of 1801, were the courts given jurisdiction over "cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties • • • " (18 Stat. 470; U. S. Comp. Stat. (1916) sec. 991 *et seq.*). Jurisdiction based on diversity of citizenship existed from the beginning, subject, however, to certain limitations, such as the necessary amount in controversy and the prohibition against suit by an assignee where the assignor could not have availed himself of Federal jurisdiction. The act of 1887-88 limited the privilege of removal

to nonresident defendants, regardless of the existence of diversity of citizenship in other cases (24 Stat. 552; 25 Stat. 433; U. S. Comp. Stat. (1916) secs. 991 (1), 2954-58). These are simply major landmarks in the delimitation by Congress of the scope of judicial power. A full collection of statutes by which Congress exercised authority over the establishment, jurisdiction, powers and procedure of the Federal courts is contained in Frankfurter and Landis' Power of Congress over Procedure in Criminal Contempts in Inferior Federal Courts — A Study in Separation of Power (1924), (37 Harvard Law Rev. 1010, 1059, 1100).

Judicial recognition of this authority has been expressed from the time of Chief Justice Ellsworth to our day. The following, arranged chronologically, are typical:

> Ellsworth, C. J., in Turner *v.* Bank (4 Dall. 8 (1799)) "A circuit court, however, is of *limited* jurisdiction, and has cognizance, not of cases generally, but only of a few special circumstances, amounting to a small proportion of the cases, which an unlimited jurisdiction would embrace."
>
> Daniel, J., in Cary *v.* Curtis (3 How. 236, 245 (1845)) (upholding statute forbidding action against collector to recover duties paid under protest): "Secondly, in the doctrine so often ruled in this court, that the judicial power of the United States, although it has its origin in the Constitution, is (except in enumerated instances, applicable exclusively to this court) dependent for its distribution and organization, and for the modes of its exercise, entirely upon the action of Congress, who possess the sole power of creating the tribunals (inferior to the Supreme Court) for the exercise of the judicial power, and of investing them with jurisdiction, either limited, concurrent, or exclusive, and of withholding jurisdiction from them in the exact degrees and character which to Congress may seem proper for the public good • • •. The existence of the judicial act itself, with its several supplements, furnishes proof unanswerable on this point. The courts of the United States are all

limited in their nature and constitution, and have not the powers inherent in courts existing by prescription or by the common law."

Grier, J., in Sheldon *v.* Sill (8 How. 441, 449 (1850)) (upholding assignee clause of judiciary act): "The Constitution has defined the limits of the judicial power of the United States, but has not prescribed how much of it shall be exercised by the circuit court; consequently, the statute which does prescribe the limits of their jurisdiction, can not be in conflict with the Constitution, unless it confers powers not enumerated therein."

Swayne, J., in Mayor *v.* Cooper (6 Wall. 247, 252 (1867)) (upholding statute allowing removal in single class of cases involving law of Congress): "As regards all courts of the United States inferior to this tribunal, two things are necessary to create jurisdiction, whether original or appellate. The Constitution must have given to the court the capacity to take it, and an act of Congress must have supplied it."

Field, J., in Ex parte Robinson (19 Wall. 505, 510-511 (1873)) (upholding statute limiting summary power to punish for contempt): "The moment the courts of the United States were called into existence and invested with jurisdiction over any subject, they became possessed of this power (to punish for contempt). But the power has been limited and defined by the act of Congress of March 2, 1831. The act, in terms, applies to all courts; whether it can be held to limit the authority of the Supreme Court, which derives its existence and powers from the Constitution, may perhaps be a matter of doubt. But that it applies to the circuit and district courts there can be no question. These courts were created by act of Congress. Their powers and duties depend upon the act calling them into existence, or subsequent acts extending or limiting their jurisdiction."

Miller, J., in United States *v.* Union Pac. R. R. (98 U. S. 569, 603): "We say therefore, that, with the exception of the Supreme Court the authority of Congress, in creating courts and conferring on them all

or much or little of the judicial power of the United States, is unlimited by the Constitution."

Fuller, C. J., in Ex parte Wisner (203 U. S. 449, 455): "The Supreme Court alone possesses jurisdiction derived immediately from the Constitution, and of which the legislative power can not deprive it • • •; but the jurisdiction of the circuit courts depends upon some act of Congress."

Sutherland, J., in Kline v. Burke Const. Co. (260 U. S. 226, 233-34 (1922)): "The right of a litigant to maintain an action in a Federal court on the ground that there is a controversy between citizens of different States is not one derived from the Constitution, unless in a very indirect sense. Certainly it is not a right granted by the Constitution. The applicable provisions, so far as necessary to be quoted here, are contained in Article III • • •. The effect of these provisions is not to vest jurisdiction in the inferior courts over the designated cases and controversies but to delimit those in respect of which Congress may confer jurisdiction upon such courts as it creates • • • That body may give, withhold, or restrict such jurisdiction at its discretion, provided it be not extended beyond the boundaries fixed by the Constitution • • • And the jurisdiction having been conferred may, at the will of Congress, be taken away in whole or in part. • • •"

Taft, C. J., in Myers v. United States (272 U. S. 52, 129-30 (1926)) (on a suggested analogy between the power of Congress over lower Federal courts and over removal of inferior officers): "By the second section of article 3 the judicial power is extended to all cases in law and equity under this Constitution and to a substantial number of other classes of cases. Under the accepted construction the cases mentioned in this section are treated as a description and reservoir of the judicial power of the United States and a boundary of that power as between the United States and the States, and the field of jurisdiction within the limits of which Congress may vest particular jurisdiction in any one inferior Federal court which it may constitute."

Against this current of authority can be set only certain statements of Story, J., bred of his militant federalism. Thus, in Martin *v.* Hunter's Lessee (1 Wheat. 304, 330 (1816)), he said:

> If, then, it is a duty of Congress to vest the judicial power of the United States, it is a duty of Congress to vest the whole judicial power.

But this was simply a statement of personal views; at page 337 of the case he recognizes that the decision need not be placed on any such iconoclastic ground. For other expressions of Story's political philosophy see 1 Story, Life and Letters of Joseph Story (1851) 293. Compare also his insistence that the power of Congress over interstate commerce was "exclusive," another facet of his federalist philosophy. Dissenting in Mayor *v.* Miln (11 Pet. 102 (1837)). Story's opinion is a maverick in the judicial fold.

Nowhere has the matter been more succinctly put than in an address of the late Chief Justice Taft before the American Bar Association in 1922:

> But of course the taking away of fundamental jurisdiction from the Federal courts is within the power of Congress and it is not for me to discuss such a legislative policy (47 Rep. A. B. A. (1922) 250, 259).

B. **Power of Congress over Federal equity jurisdiction.**— Apart from the seventh amendment, probably no question would arise of the power to affect equity jurisdiction were it not for certain statements in the books that Federal equity jurisdiction is like that existing in England in 1789. (See e. g., Boyle *v.* Zacharie, 6 Pet. 648, 658 (1832); Payne *v.* Hook, 7 Wall. 425, 430 (1868); McConihay *v.* Wright, 121 U. S. 201, 206 (1887).) These statements, however, must be read in the light of the problem to which they were addressed. They express the formula by

which a uniform equity jurisdiction was established for the Federal courts despite the great divergences in the practice of the States at the time of the Constitution. Of the 13 States, 5 had separate courts of chancery, 3 had no chancery courts, but certain equity powers were given to the common-law courts, 2 had common-law courts with a very few limited equity powers, 1 had only common-law courts, and in 2 the legislature exercised some chancery powers. (See The Federalist, No. 83; Warren, New Light on the History of the Judiciary Act (1923), 37 Harvard Law Rev. 49, 96-101.) It is to express the independence of Federal equity from that of the States, not from congressional control, that the formula has been used. The cases in which it has been employed all involved the effect of State relaxation of the dichotomy of law and equity. It is frequently said that the States can neither enlarge nor diminish the equity jurisdiction of the Federal courts, e. g., Cates *v.* Allen (149 U. S. 451); Mississippi Mills *v.* Cohen (150 U. S. 202). Yet even here growth and change have been possible, for it is held that a new "right" created in equity by a State, as distinguished from a new equitable remedy, will be enforced in the Federal courts. (See a recent discussion of this question in Henrietta Mills *v.* Rutherford County, 281 U. S. 121 (1930).)

Even in these cases dealing with State practice, the Supreme Court has often been careful to advert to the part which Congress plays in shaping Federal equity jurisdiction. See, for example, the following:

> Marshall, C. J., in United States *v.* Howland (4 Wheat. 106 (1819) at p. 115): "• • • and as the courts of the union have a chancery jurisdiction in every State, and the judiciary act confers the same chancery powers on all, and gives the same rule of decision, its jurisdiction in Massachusetts must be the same as in other States."
>
> Curtis, J., in Neves *v.* Scott (13 How. 268, 272 (1851)): "But in all the States the equity law, recog-

> nized by the Constitution and by acts of Congress, and modified by the latter, is administered by the courts of the United States, and upon appeal by this court."

Perhaps the most suggestive characterization of the relation of the practice of the high court of chancery to Federal equity practice is contained in a statement of McLean, J., in Pennsylvania *v.* Wheeling Bridge Co. (13 How. 518, 563 (1851)):

> This may be said to be the common law of chancery, and since the organization of the Government it has been observed.

Indeed, on at least one occasion the court felt constrained to point out that there was a body of principles of equity apart from laws of Congress:

> It is a mistake to suppose that for the determination of equities and equitable rights we must look only to the statutes of Congress. The principles of equity exist independently of and anterior to all Congressional legislation, and the statutes are either annunciations of those principles or limitations upon their application in particular cases. (Brewer, J., in United States *v.* Detroit Lumber Co., 200 U. S. 321, 339 (1906).)

But reliance need not be had on general statements. Congress has actually affected the scope of equity jurisdiction. In 1911 an important step was taken in the direction of a union of law and equity, by virtue of the statute allowing equitable defenses to be pleaded in an action at law, and equitable relief to be sought by way of answer to an action at law. (Judicial Code, sec. 274b, 38 Stat. 956; 28 U. S. C., sec. 398). Discussing this provision in an address referred to above, Chief Justice Taft said:

> Already under the Federal code, there is a statutory provision which has not yet been much con-

> sidered by the courts, by which an equitable defense may be pleaded to a suit at law. If we may go so far, it is a little difficult to see why the distinction between the two courts may not be wholly abolished, and the constitutional right of trial by jury retained unaffected (47 Rep. A. B. A. (1922) 250, 260).

Three months later the Chief Justice had occasion to echo these remarks in the course of an opinion:

> Section 274b is an important step toward a consolidation of the Federal courts of law and equity, and the questions presented in this union are to be solved much as they have been under the State codes. (Liberty Oil Co. v. Condon Bank, 260 U. S. 235 (1922).)

More particular instances are at hand. Since 1793 Congress has prohibited the granting of an injunction to stay proceedings in any court of a state, except in bankruptcy. (1 Stat. 334 (1793); 36 Stat. 1162 (1911); 28 U. S. C., sec. 379; Judicial Code, sec. 265.) Since 1867 Congress has forbidden suits to restrain the assessment or collection of any tax. (14 Stat. 475; 26 U. S. C., sec. 154.) This provision was recently extended to include transferees of a taxpayer. (45 Stat. 873 (1928), 26 U. S. C., sec. 2604, upheld in Phillips *v.* Commissioner, 283 U. S. 589 (1931).)

A related question was presented by sections 21 and 22 of the Clayton Act, requiring a jury trial in certain classes of contempts. During the course of the debates in the House, John W. Davis, then a Member from West Virginia, summarily dealt with the question:

> It has been hinted, not argued, that this measure goes beyond the constitutional power of Congress as to the courts * * *. I must content myself with a mere quotation again from the Supreme Court of the United States in the case of In re Robinson (19 Wall. 505), having reference to the power to punish for contempt. * * * (See quotation on p. 3, supra; 48 Cong. Rec., pt. 7, p. 6441 (1912).)

The provision was upheld in Michaelson *v.* United States (266 U. S. 42 (1924)). Certain statements of Mr. Justice Sutherland in that case call for a word of comment. Superficially they seem to run counter to the current of authority already cited, e. g., the dictum that "If the statute now under review encroaches upon the equity jurisdiction intended by the Constitution, a grave constitutional question in respect of its validity would be presented; * * *." How the intent of the Constitution is to be determined is not stated. But the whole context indicates that the difficulty present to the mind of Mr. Justice Sutherland was that Congress might deprive the court of powers necessary to its proper functioning. This is the statement of the result of the case by the late Judge Rose of the fourth circuit:

> As all the inferior Federal courts are the creatures of Congress, the latter has the right to restrict their jurisdiction over contempts as well as over other matters, provided it leaves them still able to function as courts.

If the dictum of Mr. Justice Sutherland means more than this, it can hardly be reconciled with the views expressed by Chief Justice Taft. Judge Rose's view is found in his Federal Jurisdiction and Procedure (1926 ed., p. 35).

Indeed, real limits on congressional power do derive from the traditional ideas of the proper functions of a court. Independence of judgment must not be interfered with; thus Congress may not, under the guise of a jurisdictional rule, prescribe an arbitrary rule of decision on the merits. (United States *v.* Klein, 13 Wall. 128 (1871).) Nor may Congress place finality of judgment in the executive department after a decision by the courts. (Gordon *v.* United States, 117 U. S. 697 (1864).) Nor may courts be given the duty of passing upon matters which

other branches of the Government are peculiarly adapted to decide. (Oetjen v. Central Leather Co., 246 U. S. 297 (1918) (recognition of foreign government), Keller *v.* Potomac Electric Power Co., 261 U. S. 428 (1923) (rate fixing).) These are the types of cases in which the power of Congress over the judiciary has been successfully controverted.

C. **Conclusion.**—The power of Congress over the equity powers of the lower Federal courts is implied in congressional power over these courts generally, as exercised in the whole series of judiciary acts, and as recognized by a continuous current of judicial authority. The immunity of Federal equity powers to change is a doctrine for the preservation of uniformity and is directed at the effects of varying State practice; even here, however, some inroads have been made where the State law creates a new "right." The authority of Congress to establish a union of law and equity, preserving the right to jury trial where proper, has been recognized by high authority. Congress has prohibited injunctive relief in certain classes of cases. The acts of Congress which have been held unconstitutional, dealing with judicial powers, have violated the traditional canons of judicial functions. No act of Congress has been held unconstitutional on the ground that it interfered with Federal equity powers. For Congress itself to hesitate on this ground would seem to be a paradoxical bit of self-abnegation.

CALENDAR NO. 176

72d Congress, 1st Session | SENATE | Report No. 163

TO DEFINE AND LIMIT THE JURISDICTION OF COURTS SITTING IN EQUITY

February 4, 1932.—Ordered to be printed

Mr. Norris, from the Committee on the Judiciary, submitted the following

REPORT

[To accompany S. 935]

The Committee on the Judiciary, to which was referred the bill (S. 935) to amend the Judicial Code and to define and limit the jurisdiction of courts sitting in equity, and for other purposes, having had the same under consideration, beg leave to report as follows:

We recommend that the bill be amended as hereinafter set forth, and, as so amended, that the bill be passed.

The following amendments are recommended:

1. On page 2, line 10, after the word "wherefore", insert the following: "though he should be free to decline to associate with his fellows".

2. On page 3, line 1, after the word "enforceable", insert the words "in any court of the United States".

3. On page 3, line 3, after the word "any", insert the word "such".

4. On page 3, line 3, after the word "court", strike out the words "of the United States".

5. On page 3, line 2, strike out the word "cases" and insert, in lieu thereof, the words "any case".

6. On page 8, line 25, after the word "proceedings", insert the words "and on his filing the usual bond for costs".

7. On page 9, line 1, after the word "certify", insert the words "as in ordinary cases".

8. On page 9, line 1, strike out the word "entire".

9. On page 9, line 1, after the word "case", strike out the words "including a transcript of the evidence taken".

10. On page 9, line 9, strike out the word "where" and insert, in lieu thereof, the words "in which".

11. On page 9, line 10, strike out the words "indirect criminal".

12. On page 9, line 15, strike out the word "requirement" and insert, in lieu thereof, the word "right".

13. On page 9, line 15, after the word "not", strike out the words "be construed to".

14. On page 9, line 22, after the word "court", where it first appears in said line, strike out the words "is authorized to" and insert, in lieu thereof, the word "may".

15. On page 10, line 1, after the word "the", strike out the word "attack" and insert, in lieu thereof, the word "contempt".

16. On page 10, line 1, after the word "occurred", strike out the word "otherwise" and insert, in lieu thereof, the word "elsewhere".

17. On page 10, line 2, strike out the words "open court" and insert in lieu thereof the words "the presence of the court or so near thereto as to interfere directly with the administration of justice".

18. On page 10, line 4, after the word "as", insert the word "is".

19. On page 10, line 4, after the word "provided", strike out down to and including the word "Code" in line 6, and insert in lieu thereof the words "by law".

20. On page 11, line 15, strike out the word "and" and insert in lieu thereof the word "or".

21. On page 11, line 24, after the word "any", strike out the word "provisions" and insert in lieu thereof the word "provision".

22. On page 11, line 24, after the word "act", strike out down to and including the word "circumstance" in line 25.

23. On page 11, line 25, after the word "held", insert the words "unconstitutional or otherwise".

24. On page 12, line 1, after the word "the" where it first appears in said line, strike out the word "remainder" and in lieu thereof insert the words "remaining provisions".

25. On page 12, line 1, after the word "act", strike out down to and including the word "circumstances" in line 2, page 12.

The Committee on the Judiciary has been considering the subject of injunctions in labor disputes for several years, and this bill is a result of such study and consideration.

In the Seventieth Congress, on December 12, 1927, the Senator from Minnesota, Mr. Shipstead, introduced a bill on the subject (S. 1482). From that time to the present the Judiciary Committee, in one form or another, has had under consideration the question of limiting the jurisdiction of Federal courts in granting injunctions in labor disputes.

In the Seventieth Congress the bill referred to (S. 1482) was referred to a subcommittee consisting of the Senator

from Wisconsin, Mr. Blaine; the Senator from Montana, Mr. Walsh; and the writer. This subcommittee held extensive and unlimited public hearings upon the bill. No limit was placed upon the hearings, and those who favored the legislation and those who were opposed to the legislation were heard without limitation.

At the close of the hearings this subcommittee, in executive session, went over the hearings and discussed all phases of the proposed legislation. The subcommittee was unanimous in reaching the conclusion that some legislation on this subject was absolutely necessary in the public interest; but it likewise reached the conclusion that the bill under consideration did not fully meet the requirements.

After further consideration this subcommittee called into consultation economists and attorneys who had made a special study of this particular subject. They invited Prof. Felix Frankfurter, of the law school of Harvard University, Cambridge, Mass.; Herman Oliphant, former professor of law at Columbia University, now a member of the faculty of the institute of law, the Johns Hopkins University, Baltimore, Md.; Prof. Francis B. Sayre, law school of Harvard University, Cambridge, Mass.; Mr. Edwin E. Witte, chief of the legislative reference library, Madison, Wis.; and Hon. Donald R. Richberg, attorney, of Chicago, Ill., to meet with the subcommittee for the purpose of giving further consideration to the subject and drafting proper legislation. As a result of such consultation and deliberation, the subcommittee prepared a substitute bill which, in its essential and material particulars, is practically the same as the bill now reported to the Senate (S. 935).

The subcommittee reported this substitute to the full Committee on the Judiciary. After this report was made and after considerable consideration by the full Committee, various attorneys representing interests opposed to the

enactment of the proposed bill requested further hearings upon the substitute bill recommended by the subcommittee.

The Committee on the Judiciary, after considerable discussion, thereupon referred the entire matter back to the subcommittee, with instructions to hold further hearings upon the proposed substitute. In accordance with these directions, the subcommittee again held public hearings and gave to all persons who so desired an opportunity to be heard. At the close of the hearings, the subcommittee again reported the bill to the full committee, with the recommendation that the substitute be agreed to and that the bill, as thus amended, be favorably reported to the Senate.

The proposed bill was the subject of consideration and discussion in the full committee for several weeks, but no final action was taken by the full committee during that session of the Seventieth Congress. At the second or short session of the Seventieth Congress, the bill was again taken up by the full committee, but no conclusion was reached and at the final adjournment of the Congress the bill died upon the calendar of the committee without any action thereon.

At the beginning of the regular session of the Seventy-first Congress, on the 9th day of December, 1929, the Senator from Minnesota, Mr. Shipstead, again introduced his bill, this time known as S. 2497, which bill was in practically the same form as the bill, S. 1482, of the Seventieth Congress.

The Judiciary Committee referred the bill to the same subcommittee which had handled the matter in the Seventieth Congress. This subcommittee, having given such extensive hearings and consideration to the bill in the Seventieth Congress, did not feel that additional hearings were necessary. Nevertheless, upon application of attorneys representing corporations and organizations opposed to the enactment of this kind of legislation, limited

hearings were again held and all interested parties were permitted to file written briefs.

The subcommittee, after giving further consideration to the subject, and after making several amendments to the substitute bill previously prepared by the subcommittee, again reported the bill to the full committee with the recommendation that the amended substitute be agreed to and that the bill, as thus amended, be favorably reported to the Senate.

After further consideration by the full committee upon the report of the subcommittee, the substitute proposed by the subcommittee was amended by the full committee in several respects, but, upon motion to report the bill to the Senate as amended by the proposed subcommittee substitute, with a recommendation that as thus amended the bill be passed, 7 members of the committee voted in favor of such report and 7 members voted against making the report (3 members not voting). Thus the motion to make a favorable report was defeated.

The proposed substitute bill, however, was again further considered by the full committee and, as a result thereof, by a majority vote of the committee, the proposed bill was submitted to the Attorney General with the request that he indicate to the committee his views concerning the constitutionality of the proposed legislation and also as to the effect the enactment of such legislation would have upon the United States in cases in which the Government may desire to apply to Federal courts for equitable relief by injunction. After giving the matter consideration, the Attorney General declined to comply with the committee's request and in an official communication so informed the committee.

At the next meeting of the committee the substitute bill was again taken up and, after further discussion, the committee, by a majority vote, decided to make an adverse report upon the bill. The majority report was made by Sen-

ator Steiwer on June 18 (calendar day, June 20), 1930 (71st Cong., 2d sess., Rept. No. 1060). The minority report was filed on the same day and is known as Report No. 1060, part 2.

No action, however, was taken by the Senate upon the bill thus adversely reported and the same died upon the calendar of the Senate upon the adjournment of the Seventy-first Congress.

Soon after the convening of the Seventy-second Congress, on December 9, 1931, the present bill, S. 935, was introduced in the Senate. This bill, for all practical purposes, is the same as the substitute bill reported by the subcommittee in both the Seventieth and the Seventy-first Congresses.

Immediately upon the introduction of the bill various interests opposed to the bill again applied to the committee for further hearings. The committee, however, after considering such applications, reached the conclusion that sufficient hearings had been had, but they did allow all persons interested who desired to do so, to file written briefs upon the subject, limiting the time for the filing of such briefs to the 25th day of January, 1932.

Thereupon the full committee again took up the consideration of the bill and, after many days of consideration in executive session, the amendments heretofore suggested were agreed upon by the committee and, as thus amended, the committee, by a vote of 11 to 6, ordered a favorable report made to the Senate.

The bill, as thus reported, if the amendments suggested by the committee are agreed to, will read as follows:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That no court of the United States, as herein defined, shall have jurisdiction to issue any restraining order or temporary or permanent injunc-

tion in a case involving or growing out of a labor dispute, except in strict conformity with the provisions of this act; nor shall any such restraining order or temporary or permanent injunction be issued contrary to the public policy declared in this act.

SEC. 2. In the interpretation of this act and in determining the jurisdiction and authority of the courts of the United States, as such jurisdiction and authority are herein defined and limited, the public policy of the United States is hereby declared as follows:

Whereas under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership association, the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment, wherefore, though he should be free to decline to associate with his fellows, it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection; therefore, the following definitions of, and limitations upon, the jurisdiction and authority of the courts of the United States are hereby enacted.

SEC. 3. Any undertaking or promise, such as is described in this section, or any other undertaking or promise in conflict with the public policy declared in section 2 of this Act, is hereby declared to be contrary to the public policy of the United States, shall not be enforceable in any court of the United States and shall not afford any basis for the granting of legal or equitable relief by any such court, including specifically the following:

Every undertaking or promise hereafter made,

whether written or oral, express or implied, constituting or contained in any contract or agreement of hiring or employment between any individual, firm, company, association, or corporation, and any employee or prospective employee of the same, whereby—

(a) Either party to such contract or agreement undertakes or promises not to join, become, or remain a member of any labor organization or of any employer organization; or

(b) Either party to such contract or agreement undertakes or promises that he will withdraw from an employment relation in the event that he joins, becomes, or remains a member of any labor organization or of any employer organization.

SEC. 4. No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:

(a) Ceasing or refusing to perform any work or to remain in any relation of employment;

(b) Becoming or remaining a member of any labor organization or of any employer organization, regardless of any such undertaking or promise as is described in section 3 of this act;

(c) Paying or giving to, or withholding from, any person participating or interested in such labor dispute, any strike or unemployment benefits or insurance, or other moneys or things of value;

(d) By all lawful means aiding any person participating or interested in any labor dispute who is being proceeded against in, or is prosecuting, any action or suit in any court of the United States or of any State;

(e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertis-

ing, speaking, patrolling, or by any other method not involving fraud or violence;

(f) Assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute;

(g) Advising or notfying any person of an intention to do any of the acts heretofore specified;

(h) Agreeing with other persons to do or not to do any of the acts heretofore specified; and

(i) Advising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified, regardless of any such undertaking or promise as is described in section 3 of this act.

SEC. 5. No court of the United States shall have jurisdiction to issue a restraining order or temporary or permanent injunction upon the ground that any of the persons participating or interested in a labor dispute constitute or are engaged in an unlawful combination of conspiracy because of the doing in concert of the acts enumerated in section 4 of this act.

SEC. 6. No officer or member of any association or organization, and no association or organization participating or interested in a labor dispute, shall be held responsible or liable in any court of the United States for the unlawful acts of individual officers, members, or agents, except upon clear proof of actual participation in, or actual authorization, of such acts, or of ratification of such acts after actual knowledge thereof.

SEC. 7. No court of the United States shall have jurisdiction to issue a temporary or permanent injunction in any case involving or growing out of a labor dispute, as herein defined, except after hearing the testimony of witnesses in open court (with opportunity for cross-examination) in support of the allegations of a complaint made under oath, and testimony in opposition thereto, if offered, and except after findings of fact by the court, to the effect—

(a) That unlawful acts have been committed and will be continued unless restrained;

(b) That substantial and irreparable injury to complainant's property will follow;

(c) That as to each item of relief granted greater injury will be inflicted upon complainant by the denial of relief than will be inflicted upon defendants by the granting of relief;

(d) That complainant has no adequate remedy at law; and

(e) That the public officers charged with the duty to protect complainant's property are unable or unwilling to furnish adequate protection.

Such hearing shall be held after due and personal notice thereof has been given, in such manner as the court shall direct, to all known persons against whom relief is sought, and also to those public officers charged with the duty to protect complainant's property: *Provided, however,* That if a complainant shall also allege that, unless a temporary restraining order shall be issued without notice, a substantial and irreparable injury to complainant's property will be unavoidable, such a temporary restraining order may be issued upon testimony under oath, sufficient, if sustained, to justify the court in issuing a temporary injunction upon a hearing after notice. Such a temporary restraining order shall be effective for no longer than five days, and shall become void at the expiration of said five days. No temporary restraining order or temporary injunction shall be issued except on condition that complainant shall first file an undertaking with adequate security sufficient to recompense those enjoined for any loss, expense, or damage caused by the improvident or erroneous issuance of such order or injunction, including all reasonable costs (together with a reasonable attorney's fee) and expense of defense against the order or against the granting of an injunctive relief sought in the same proceeding and subsequently denied by the court.

The undertaking herein mentioned shall be understood to signify an agreement entered into by the complainant and the surety upon which a decree may be rendered in the same suit or proceeding against

said complainant and surety, the said complainant and surety submitting themselves to the jurisdiction of the court for that purpose. But nothing herein contained shall deprive any party having a claim or cause of action under or upon such undertaking from electing to pursue his ordinary remedy by suit at law or in equity.

SEC. 8. No restraining order or injunctive relief shall be granted to any complainant who has failed to comply with any obligation imposed by law which is involved in the labor dispute in question, or who has failed to make every reasonable effort to settle such dispute, either by negotiation or with the aid of any available governmental machinery of mediation or voluntary arbitration.

SEC. 9. No restraining order or temporary or permanent injunction shall be granted in a case involving or growing out of a labor dispute, except on the basis of findings of fact made and filed by the court in the record of the case prior to the issuance of such restraining order or injunction; and every restraining order or injunction granted in a case involving or growing out of a labor dispute shall include only a prohibition of such specific act or acts as may be expressly complained of in the bill of complaint or petition filed in such case and as shall be expressly included in said findings of fact made and filed by the court as provided herein.

SEC. 10. Wherever any court of the United States shall issue or deny any temporary injunction in a case involving or growing out of a labor dispute, the court shall, upon the request of any party to the proceedings, and on his filing the usual bond for costs, forthwith certify as in ordinary cases the record of the case, to the circuit court of appeals for its review. Upon the filing of such record in the circuit court of appeals, the appeal shall be heard and the temporary injunctive order affirmed, modified, or set aside with the greatest possible expedition, giving the proceeding precedence over all other matters except older matters of the same character.

DEFINE JURISDICTION OF COURTS SITTING IN EQUITY

SEC. 11. In all cases in which a person shall be charged with contempt for violation of a restraining order or injunction issued by a court of the United States (as herein defined), the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the contempt shall have been committed: *Provided*, That this right shall not apply to contempts committed in the presence of the court or so near thereto as to interfere directly with the administration of justice or to apply to the misbehavior, misconduct, or disobedience of any officer of the court in respect to the writs, orders, or process of the court.

SEC. 12. The defendant in any proceeding for contempt of court may file with the court a demand for the retirement of the judge sitting in the proceeding, if the contempt arises from an attack upon the character or conduct of such judge and if the contempt occurred elsewhere than in the presence of the court or so near thereto as to interfere directly with the administration of justice. Upon the filing of any such demand the judge shall thereupon proceed no further, but another judge shall be designated in the same manner as is provided by law. The demand shall be filed prior to the hearing in the contempt proceeding.

SEC. 13. When used in this act, and for the purposes of this act—

(a) A case shall be held to involve or to grow out of a labor dispute when the case involves persons who are engaged in the same industry, trade, craft, or occupation; or have direct or indirect interests therein; or who are employees of the same employer; or who are members of the same or an affiliated organization of employers or employees; whether such dispute is (1) between one or more employers or associations of employers and one or more employees or associations of employees; (2) between one or more employers or associations of employers and one or more employers or associations of employers; or (3) between one or more employees or associations of employees and one or more employees or associations of employees; or

when the case involves any conflicting or competing interests in a "labor dispute" (as hereinafter defined) of "persons participating or interested" therein (as hereinafter defined).

(b) A person or association shall be held to be a person participating or interested in a labor dispute if relief is sought against him or it and if he or it is engaged in the same industry, trade, craft, or occupation in which such dispute occurs, or has a direct or indirect interest therein, or is a member, officer, or agent of any association composed in whole or in part of employers or employees engaged in such industry, trade, craft, or occupation.

(c) The term "labor dispute" includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, or concerning employment relations, or any other controversy arising out of the respective interests of employer and employee, regardless of whether or not the disputants stand in the proximate relation of employer and employee.

(d) The term "court of the United States" means any court of the United States whose jurisdiction has been or may be conferred or defined or limited by act of Congress, including the courts of the District of Columbia.

SEC. 14. If any provision of this act is held unconstitutional or otherwise invalid, the remaining provisions of the Act shall not be affected thereby.

SEC. 15. All acts and parts of acts in conflict with the provisions of this act are hereby repealed.

Thus, after a little more than three years of consideration by the Judiciary Committee, with the assistance of the experts heretofore named, we have reached a point where the committee, by a substantial majority, has made a definite recommendation to the Senate for remedial legislation upon this very much controverted subject.

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The limitation of the jurisdiction of Federal courts to issue injunctions in labor disputes has been a subject of public discussion for many years. It is fair to say that public sentiment on the subject has reached the conclusion that some such limitation is absolutely necessary. Both of the great political parties in their last national platforms have promised remedial legislation upon the subject. The last Republican National Convention at Kansas City adopted a plank on the subject as follows:

> The party favors freedom in wage contracts, the right of collective bargaining by free and responsible agents of their own choosing, which develops and maintains that purposeful cooperation which gains its chief incentive through voluntary agreement.
>
> We believe that injunctions in labor disputes have in some instances been abused and have given rise to a serious question for legislation.

Following this, the last Democratic National Convention at Houston, Tex., in its platform, made the following provises:

> (*a*) We favor the principle of collective bargaining and the Democratic principle that organized labor should choose its own representatives without coercion or interference.
>
> (*b*) Labor is not a commodity. Human rights must be safeguarded. Labor should be exempt from the operation of antitrust laws.
>
> (*c*) We recognize that legislative and other investigations have shown the existence of grave abuse in the issuance of injunctions in labor disputes. No injunctions should be granted in labor disputes except upon proof of threatened irreparable injury and after notice and hearing, and the injunction should be confined to those acts which do directly threaten irreparable injury. The expressed purpose of representatives of capital, labor, and the bar to devise a plan for the elimination of the present evils with respect to injunctions must be supported and legislation designed to accomplish these ends formulated and passed.

It is, therefore, a nonpartisan question, and, assuming that both of these great political parties in their national conventions were acting in good faith, it follows that either this bill or some other legislation of similar import, carrying out the pledges made to the people of the United States, should be promptly enacted.

The injunction process is an extremely harsh remedy. Particularly is this true when a restraining order is issued without any notice to any of the defendants; and in nearly every case in a labor dispute where an injunction is issued, the restraining order is the first step. The first knowledge which the defendant has is service of notice upon him that the restraining order has already been issued. Before he is given an opportunity to be heard, he is enjoined, and in most cases he is restrained from doing acts and things which seriously interfere with, and sometimes completely deny, his fundamental right of liberty of action, which belongs to every free citizen.

That there have been abuses of judicial power in granting injunctions in labor disputes is hardly open to discussion. The use of the injunction in such disputes has been growing by leaps and bounds.

It is impossible to report with accuracy the number of injunctions issued in either the State or Federal courts in connection with labor disputes in recent years. Only a small percentage of these injunction cases are reported officially. For example, approximately 300 were issued in connection with the railway shopmen's strike of 1922, but only 12 were officially reported (Frankfurter on "The Labor Injunction," p. 52).

In testimony before the committee the president of the American Federation of Labor submitted a partial list of 389 labor injunctions in State and Federal courts during the last decade, most of which are unreported. (Hearings, February, 1928, pp. 77-86.) Out of over 260 cases listed

by the Massachusetts Bureau of Statistics in the period of 1898-1916, only 18 were officially reported (p. 51). A large majority of injunction proceedings are never carried beyond a restraining order or temporary injunction and, therefore, are unlikely ever to reach the stage of official reporting, which is concerned largely with final decrees and with decisions of appellate courts. Therefore, exact statistics can not be presented, but the statement can be safely made that since 1890, when labor injunctions were practically unknown, their issuance has steadily increased until there are few controversies of substantial importance between employers and employees in which one or more injunctions will not be issued out of either a State or a Federal court.

The right of wage earners to organize and to act jointly in questions affecting wages, conditions of labor, and the welfare of labor generally is conceded and recognized by all students of the subject. An increasing necessity for the organization of labor has been brought about by modern economic conditions and methods of doing business, which have in the main been developed by the aid of governmental authority.

It is obvious that existing conditions under which large employers of labor possess unprecedented power to dictate contracts and conditions of employment have been developed through governmental grants of authority to form corporations and organizations of corporations, whereby thousands of owners of property are enabled to combine hundreds of millions of dollars of capital and, in this way, substantially to control and sometimes to monopolize opportunities for employment. Such a power, unrestrained by the organization of labor, would permit employers arbitrarily to fix the wages and conditions of labor under which millions of men and women would find their only opportunity to earn a living.

A single laborer, standing alone, confronted with such

far-reaching, overwhelming concentration of employer power, and compelled to labor for the support of himself and family, is absolutely helpless to negotiate or to exert any influence over the fixing of his wages or the hours and conditions of his labor. A man must work in order to live. If he can exercise no control over his conditions of employment, he is subjected to involuntary servitude.

The efforts of the workers to preserve their freedom of association and their freedom in association to influence the fixing of wages and working conditions present questions which are unique and demand specific legislative action. The situation has been very well described by Chief Justice Taft in the opinion of the court delivered by him in American Foundries *v.* Tri-City Council (257 U. S. 184, at p. 209), reading in part as follows:

> • • • Labor unions are recognized by the Clayton Act as legal when instituted for mutual help and lawfully carrying out their legitimate objects. • • • They were organized out of the necessities of the situation. A single employee was helpless in dealing with an employer. He was dependent ordinarily on his daily wage for the maintenance of himself and family. If the employer refused to pay him the wages that he thought fair, he was nevertheless unable to leave the employ and to resist arbitrary and unfair treatment. Union was essential to give laborers opportunity to deal on equality with their employer. • • •. The right to combine for such a lawful purpose has in many years not been denied by any court. The strike became a lawful instrument in a lawful economic struggle or competition between employer and employees as to the share or division between them of the joint products of labor and capital. To render this combination at all effective, employees must make their combination extend beyond one shop. It is helpful to have as many as may be in the same trade in the same community united, because in the competition between employers they are bound to be affected by the standard of wages of their trade in the neighborhood.

The foregoing opinion is cited with approval in the unanimous opinion of the Supreme Court handed down May 26, 1930, in Texas & New Orleans Railroad Co. *v.* Brotherhood of Railway & Steamship Clerks, in support of the following statement in the opinion by Mr. Chief Justice Hughes:

> The legality of collective action on the part of employees in order to safeguard their proper interests is not to be disputed. It has long been recognized that employees are entitled to organize for the purpose of securing the redress of grievances and to promote agreements with employers relating to rates of pay and conditions of work (citing the Tri-City case). Congress was not required to ignore this right of the employees, but could safeguard it and seek to make their appropriate collective action an instrument of peace rather than of strife.

If we concede, as we must, that labor has the right to combine for the lawful purpose of securing employment and has likewise the right to combine for the purpose of securing increased wages or bettering conditions of labor, then it follows, as the late Chief Justice Taft has so well stated, that the strike becomes a lawful instrument in the economic struggle between employer and employee. It would be hypocrisy, however, to concede these rights to labor and then to prohibit any effective exercise of these rights by labor. The primary object of the proposed legislation is to protect labor in the lawful and effective exercise of its conceded rights—to protect, first, the right of free association and, second, the right to advance the lawful object of association.

No one will seriously doubt the right of Congress, under the Constitution, to limit the jurisdiction of Federal courts. The jurisdiction, for instance, of the district courts of the United States is given by act of Congress. All the courts of the United States except the Supreme Court could be entirely abolished by act of Congress, and, while Con-

gress could not give to these inferior courts jurisdiction greater than is provided by the Constitution, it could, on the other hand, within the limits of the Constitution, give to the inferior courts such jurisdiction as Congress in its wisdom deems just. It follows, also, that having given this jurisdiction, it can, by act of Congress, take away all or any part of it. This has been clearly held by the Supreme Court of the United States in Myers *v.* United States (272 U. S. 52). At page 130 the Supreme Court said:

> • • • It is clear that the mere establishment of a Federal inferior court does not vest that court with all the judicial power of the United States as conferred in the second section of Article III but only that conferred by Congress specifically on the particular court. It must be limited territorially and in the classes of cases to be heard; and the mere creation of the court does not confer jurisdiction except as it is conferred in the law of its creation or its amendments.

In an earlier case the Supreme Court held:

> The judicial power of the United States, although it has its origin in the Constitution, is (except in enumerated instances, applicable exclusively to this court) dependent for its distribution and organization, and for the modes of its exercise, entirely upon the action of Congress, who possess the sole power of creating the tribunals (inferior to the Supreme Court) for the exercise of the judicial power, and of investing them with jurisdiction either limited, concurrent, or exclusive, and of withholding jurisdiction from them in the exact degrees and character which to Congress may seem proper for the public good. (Cary *v.* Curtis, 3 How. 235 (U. S.) at 244.)

In a fairly recent case, the Supreme Court, construing the power of the inferior Federal courts to exercise jurisdiction over controversies between citizens of different States, pointed out that:

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The right of a litigant to maintain an action in a Federal court (on this ground) is not one derived from the Constitution of the United States, unless in a very indirect sense.

And continued:

> Certainly, it is not a right granted by the Constitution. • • • The Constitution simply gives to the inferior courts the capacity to take jurisdiction in the enumerated cases, but it requires an act of Congress to confer it. • • • A right which thus comes into existence only by virtue of an act of Congress, and which may be withdrawn by an act of Congress after its exercise has begun, can not well be described as a constitutional right. (Kline *v.* Burke Construction Co., 260 U. S. 226, 233.)

Public Policy

Relief by injunction is an extraordinary and harsh remedy. It should not be resorted to except in cases where such action is imperatively demanded; and yet injunctive relief is often the only adequate and effective relief against many wrongs and to prevent many irreparable injuries in controversies of infinite variety.

It is not sought by this bill to take away from the judicial power any jurisdiction to restrain by injunctive process unlawful acts or acts of fraud or violence. In order to assist the courts in the proper interpretation of the proposed legislation, it has been attempted to declare, by act of Congress, the public policy of the United States in relation to labor disputes and the issuing of injunctions in connection therewith. This is done in section 2 of the proposed substitute bill, as follows:

> • • • Whereas under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership association, the individual unorganized worker is commonly helpless

to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment, wherefore it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.

It is believed that the public policy of the United States thus declared is free from any possible objection and fundamentally beyond criticism if we desire to give those who labor equal opportunity in the economic world with the employers of labor.

In the case of Texas & New Orleans Railroad Co. *v.* Brotherhood of Railway & Steamship Clerks, decided May 26, 1930, previously quoted, the court had under consideration the provision of the railway labor act, confirming in railway employees the right of self-organization "free from the interference, influence or coercion" of employers. It will be noted that this right of employees, written into the railway labor act, is the same right which is affirmed in the declaration of public policy in the proposed bill, which affirms, in section 2, the employee's "full freedom of association, self-organization and designation of representatives of his own choosing," and provides that the employee "shall be free from the interference, restraint, or coercion of employers of labor." Therefore, the decision of the Supreme Court of May 26, 1930, sustaining the constitutionality and the enforceability of this right of employees under the railway labor act, directly and conclusively sustains the constitutionality of the declaration of policy in the proposed bill and the provision of the proposed bill making contracts contrary to such

public policy nonenforceable in the Federal courts. In this most recent opinion, the Supreme Court held:

> Such collective action (of employees) would be a mockery if representation were made futile by interferences with freedom of choice. Thus the prohibition by Congress of interference with the selection of representatives for the purpose of negotiation and conference between employers and employees, instead of being an invasion of the constitutional right of either, was based on the recognition of the rights of both.

It is also equally clear that the Congress has the right to declare the public policy of the United States so long as the policy thus declared does not conflict with the Constitution.

Where Congress has not declared the public policy it is within the province of the court to decide what the public policy is, but when such public policy has been declared by Congress it is the duty of the courts to follow such policy and to decide litigated questions related thereto in accordance with the public policy thus declared.

In the case of the People *v.* City of Chicago (321 Ill. 466-475) the Supreme Court of Illinois said:

> The public policy of a State is to be found embodied in its constitution, its statutes, and, when these are silent on the subject, in the decisions of its courts. The public policy of the State, when not fixed by the Constitution, is not unalterable but varies upon any given question with changing legislation thereon, and any action which, in the absence of legislation thereon, by the decisions of the courts has been held contrary to the public policy of the State, is no longer contrary to such public policy when such action is expressly authorized by legislative enactment.

Another Illinois case on this subject is Union Trust &

Savings Bank *v.* Telephone Co. (258 Ill. 202). The Supreme Court of Illinois said:

> While no statute has been enacted declaring such exclusive contracts criminal or giving a right of action to persons prejudiced by them, the courts have declared the public policy of the State, in accordance with the common law, to be opposed to such contracts which tend to put the power to render public service in the hands of one corporation and to take it away from all others. The legislature has the power to change this policy. It is a legislative question whether the public interest will be promoted by monopolistic rather than competitive service.

Chief Justice Marshall, in the case of McCulloch *v.* Maryland (4 Wheat. (U. S.) 315, 423), used the following language:

> Where the law is • • • calculated to affect any of the objects intrusted to the Government, to undertake here to inquire into the degree of its necessity, would be to pass the line which circumscribes the judicial department, and to tread on legislative ground.

The Supreme Court has expressly upheld the jurisdiction of Congress to declare the public policy of the United States in the case of Michaelson *v.* United States (266 U. S. 42, 68). In that case, the following language was used:

> The words of the act are plain and in terms inclusive of all classes of employment; and we find nothing in them which requires a resort to judicial construction. The reasoning of the court below really does not present a question of statutory construction, but rather an argument justifying the supposititious exception on the ground of necessity or of policy—a matter addressed to the legislative and not the judicial authority.

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The decisions and opinions of the Supreme Court of the United States in Bailey *v.* Alabama (219 U. S. 219) are significant in this connection. In that case the majority of the court held that a statute although in terms punishing a man for fraud in violating a contract to work, had the "inevitable effect" of convicting him of a crime in simply refusing to work and thus enforced peonage. This was held to be unconstitutional, in conflict with the thirteenth amendment, which was intended, as held in the majority opinion by Mr. Justice Hughes:

> • • • to make labor free, by prohibiting that control by which the personal service of one man is disposed of or coerced for another's benefit, which is the essence of involuntary servitude.

The opinion further stated:

> There is no more important concern than to safeguard the freedom of labor upon which alone can enduring prosperity be based.

It is noteworthy in this case that the dissenting opinion by Mr. Justice Holmes proceeded on the ground that the contract in question (to render services in consideration of an advance payment) was in itself a legal one, and that therefore a man could be legally punished for obtaining money by making such a contract with a fraudulent intention of breaking it. He met the argument that the enforcement of such contracts would result in peonage by the pertinent comment: "If the contract is one that ought not to be made, prohibit it." Thus both opinions already support the right of Congress to declare contracts resulting practically in involuntary servitude to be contrary to public policy and to deny their enforceability or validity in the Federal courts.

The declaration of a public policy is not new to the Congress of the United States. Such a policy is explicitly declared in the present railway labor act, as previously

noted. In this connection, it is exceedingly interesting to trace the history of that act. Originally, in the transportation act, it was provided that disputes between employers and employees should, if possible, be "decided in conference between representatives designated and authorized so to confer." In administering this law the labor board found great difficulty on account of the interference by employers with the free designation of representatives by the employees. The chairman of the board appeared before the Interstate Commerce Committee of the Senate and explained the trouble. (See Hearings, Interstate Commerce Committee of the Senate on S. 2646, 68th Cong., 1st sess.) On account of this difficulty, the present railway labor act included this specific provision:

> Representatives, for the purposes of this act, shall be designated by the respective parties in such manner as may be provided in their corporate organization or unincorporated association, or by other means of collective action, without interference, influence, or coercion exercised by either party over the self-organization or designation of representatives by the other. (Par. 3, sec. 152, title 45, U. S. C. A., 1929 sup.)

This act definitely declared the same public policy in regard to railway employees as is declared in the proposed bill in regard to all employees, and this provision of the railway labor act has been sustained by the United States Supreme Court in Texas & New Orleans Railroad Co. *v.* Brotherhood of Railroad & Steamship Clerks, decided May 26, 1930, as previously cited.

Another instance in which Congress declared the public policy of the United States is found in section 15a of the interstate commerce act, passed as a part of the transportation act of 1920. The language referred to in that act is as follows:

> Inasmuch as it is impossible (without regulation

and control in the interest of the commerce of the United States considered as a whole) to establish uniform rates upon competitive traffic which will adequately sustain all the carriers which are engaged in such traffic and which are indispensable to the communities to which they render the service of transportation, without enabling some of such carriers to receive a net railway operating income substantially and unreasonably in excess of a fair return upon the value of their railway property held for and used in the service of transportation, it is hereby declared that any carrier which receives such an income so in excess of a fair return, shall hold such part of the excess, as hereinafter prescribed, as trustee for, and shall pay it to, the United States. (41 Stat. 489.)

The declaration by Congress of the public policy thus declared was interpreted and sustained by the Supreme Court of the United States in the case of Dayton-Goose Creek Railway *v.* United States. (263 U. S. 456.) The opinion of the court in this case shows that the act was interpreted and sustained upon grounds of the public policy thus declared by Congress. The court in that case said:

> The new act seeks affirmatively to build up a system of railways prepared to handle promptly all the interstate traffic of the country. * * * To achieve this great purpose, it puts the railroad systems of the country more completely than ever under the fostering guardianship and control of the commission.
>
> Title IV of the transportation act, embracing paragraphs 418 and 422, is carefully framed to achieve its expressly declared objects.

The public policy of the United States in regard to disputes between labor and employers of labor, having been declared as provided in the proposed bill, it will become the duty of the courts to carry out this policy and to uphold it in passing upon any litigated questions which may arise under the act. Such a declaration of public policy

should be of great assistance to the courts in the adjudication of any controversies which may arise.

The "Yellow Dog" Contract

One of the very serious difficulties which has arisen in many of the injunctions which have been issued in labor disputes has been the so-called yellow-dog contract. This contract is one which requires the employee, as a condition of obtaining employment, to agree that he will not join a union while he is in such employment, or, that if he is then a member of a union, he will disassociate himself from it; that he recognizes the right of the employer to discharge him without notice; that he will not quit without giving to his employer notice sufficient to enable the employer to hire some one to take his place. Such contracts frequently require the employee to agree in advance to accept such conditions of labor, hours of labor, etc., as may from time to time be decided upon by his employer. Not all of these contracts are the same, but, in general, the conditions are such as those which have been briefly outlined. In all of them the employee waives his right of free association and genuine representation in connection with his wages, the hours of labor, and other conditions of employment. In other words, he surrenders his actual liberty of contract and to a great extent he enters into involuntary servitude. Yet the Supreme Court has held very recently that "collective action would be mockery if representation were made futile by interference with freedom of choice." (Texas & New Orleans case previously cited.)

It is no defense to say that he is not compelled to sign a contract, as is so clearly pointed out in the citation from Chief Justice Taft heretofore quoted. He is helpless in dealing with his employer. This was not always true. It is only under modern conditions where, under the law, employers organize; where large corporations control labor

in an entire line of industry. He is dependent upon his daily wage and so is his family. Therefore, he must accept whatever wages and whatever conditions are laid down by the employer. He has no other course to pursue. Union on his part with his fellow workers is absolutely necessary to protect his own liberty and, if he signs away this right, to a great extent he becomes the slave of his master.

In sustaining the right of railway employees to organize the Supreme Court held:

> Congress was not required to ignore this right of the employees but could safeguard it and seek to make their appropriate collective action an instrument of peace rather than of strife. (Texas & New Orleans case previously cited.)

This doctrine upholds the purpose of the proposed bill.

One of the objects of this legislation is to outlaw this "yellow dog" contract. It has become necessary for Congress to take some action in regard to these contracts, because many of the injunctions which have been issued by Federal courts have been based wholly or in part upon such contracts on the assumption that they are valid and not contrary to public policy.

At the first blush it would seem unnecessary to pass any legislation upon the subject, because it is difficult to see how any court could sustain such a contract even though there were no statute condemning it. Many of the most eminent jurists have always believed that such contracts were void for several reasons.

First. They are contrary to public policy. If these contracts are held to be legal in one type of litigation, it would follow that they must be held legal in all other controversies, and thus in order to sustain life and support families, laboring men may be compelled to enter into practical peonage. If men must agree in advance to surrender

any real liberty of contract in order to attain employment they are, under coercion of necessity, forced into working under conditions of involuntary servitude.

Second. These contracts should be held void because they are entered into without consideration. The employer on the one hand has his work which he wants done. The laborer on the other hand, as a consideration for his part of the contract, undertakes to perform, the labor. In practically every case there is no hiring for a definite period; no assurance of either work or fixed wages. The employer gives up none of his freedom of action and furnishes no consideration for the promise of the employee that he will surrender ordinary rights of "liberty of contract" which are inherent in every free citizen.

Third. Such contracts should be held void because they are signed by the employee under coercion. The employee is forced to accept all of these burdensome conditions in order to support himself and family, because no man will voluntarily deprive himself of his power of self-protection.

Nevertheless, since such contracts have been held by the courts to furnish a legal basis for preventing employees from organizing for self-help, it seems to be necessary that some legislative action should be taken to liberate workers from a servitude thus imposed. The bill declares that such contracts are:

> • • • contrary to the public policy of the United States, shall not be enforceable and shall not afford any basis for the granting of legal or equitable relief by any court of the United States.

Abuses of Injunctive Power

One of the indefensible things contained in a great many of the injunctions issued by Federal judges is the enjoining of any person, organization, or corporation from paying benefits to laborers who are engaged in carrying on a strike. As a rule, labor unions provide for a fund out of

which they pay benefits to their members who are out on a strike. These injunctions prohibit them from paying such benefits, although the accumulation of this fund has been in part contributed by the very men who are on a strike and under the rules of the union they are, as a matter of fact, entitled to these benefits.

Some of these injunctions go still further. They not only prohibit the unions from paying any strike benefits to men who are on a strike, but they prohibit any person, whether a member of the union or not, from in any way giving any assistance to the persons who are on the strike. It is a common thing, in the operation of coal mines, for the owners of the mine to own the houses in which the laborers live. They make a contract with the laborer for the rental which shall be paid, providing also for the surrender of the premises under conditions named in the contract of lease.

If a dispute arises between the employer and the employee as to whether the contract has been violated and as to whether the owner is entitled to dispossess the employee, the question becomes one of forcible entry and detainer under the laws of the State where the property is located. These laws usually, if not always, provide for the trial of forcible entry and detainer cases before an inferior court. Either side, being dissatisfied with the decision of the court, has the right to take an appeal. If the appeal is taken by the tenant he must put up a bond, not only to pay the costs, but to pay a reasonable rental for the property in case the decision in the higher court is against him. This is a right given him under the State law. The State law is general and applies to every one. It is the only means by which the question in dispute between landlord and tenant can be fully decided. If a tenant is wrongfully withholding the property the landlord is protected by the bond which the tenant must give providing for the payment of rental if the case shall ultimately be decided

against him. Yet, strange as it may seem, Federal judges have been in the habit of issuing injunctions restraining outsiders—usually the term used is "any person whomsoever"—from doing anything to assist the laborer in a forcible entry and detainer case pending in the State court.

All persons are enjoined from furnishing bonds to take those cases up on appeal. All persons are enjoined from paying any money in the way of expenses in connection with such litigation in the State courts. The injunctions often go far enough to prevent an attorney from giving any advice to the employee who is trying to hold possession of a house belonging to the employer. All persons are restrained from giving them any assistance while they are living in these houses, including food and fuel. Why the judges of the United States, by extending the extraordinary remedy of the injunction, should prohibit laboring men from litigating in State courts, under the law of the State, to sustain what they claim to be their rights, is almost beyond human comprehension. In truth, such a summary method of depriving persons of their "day in court" has never been held to be "due process of law" in any other class of cases.

The bill, under section 4, takes away from all Federal courts the power to issue such injunctions. It also, in the same section, prohibits the issuing of injunctions which restrain employees from—

> • • • assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute.

It prohibits Federal courts from issuing injunctions restraining anyone from inducing or advising without threat, fraud, or violence, any of these things regardless of whether the employee may have signed the so-called "yellow dog" contract.

Section 4 also prohibits the granting of injunctions

which would restrain strikers from giving publicity to the existence of or the facts involved in a labor dispute. One of the most recent injunctions in a labor dispute was issued in the District Court of the United States for the Northern District of Iowa. This injunction was issued on the 29th day of March, 1930, enjoining the defendants, among other things, from—

> • • • printing, publishing, issuing, circulating and distributing, or otherwise communicating, directly or indirectly, in writing or verbally to any person, association of persons, or corporation, any statement or notice of any kind or character whatsoever, stating or representing:
>
> (1) That there is a strike at the mill or plant of complainant at Fort Dodge, Iowa; or that the strike of 1921 is still in existence; or that there is a controversy over wages or conditions of employment between complainant and its employees; or any false statement with reference to conditions of employment at complainant's plant.
>
> (2) That complainant is unfair to organized union labor, or that its products are or were unfair to organized labor, or are on an unfair list.
>
> (3) That complainant forces or requires its employees to sign or subscribe to the so-called "yellow-dog" contract.

The defendants in this case; it will be observed, were not allowed to tell anyone that a strike was in progress. They were not allowed to give any publicity in any way to the fact that a strike existed. They were not allowed to tell anyone that the complainant required its employees to sign the "yellow dog" contract. In other words, their mouths were absolutely closed and "free speech" was forbidden. They could not, without violating this injunction, have sought advice from an attorney. The son would not be allowed to seek advice from his own father. And if the defendants violated this severe decree they would be liable for contempt of court, which means that they would

be tried for an offense made illegal by the judge—an offense consisting of an act which would be perfectly lawful under the laws of the State where the controversy existed. They were not only forbidden to violate this judge-made statute, but, in case they did violate it, they would be tried by the man who made the statute. They would not be allowed a trial before a jury of their peers—a privilege granted to the vilest of criminals.

It has long been recognized by students of law and government that the power to make law and the power to enforce law should be separated as a protection against tyranny. To prevent executive tyranny, the legislative power has been carefully separated from the executive power in our scheme of government and to prevent judicial tyranny it is equally necessary to preserve the separation of the legislative power from the judicial power.

A warning against the growing exercise of legislative power by the courts in injunction cases was uttered long ago by the great commentator, Blackstone, in the following language:

> In all tyrannical government, the supreme magistracy or the right of making and enforcing laws is vested in one and the same man, or one and the same body of men; and wherever these two powers are united together there can be no public liberty. (1 Blackstone 142.)

It is amazing to realize that in the last 40 years there has developed in the American courts the practice of writing a special law to fit the individual case by judges in issuing labor injunctions; and that thereupon the judge, who himself wrote the law, has undertaken to prescribe the penalty for its violation and to punish the violator without permitting the accused to enjoy a trial by jury or even to insist upon a trial before another judge. It can not be successfully claimed that the courts have not

written into these injunction cases a new law of labor disputes, fitting the law to each particular case, and then enforcing this new law made by the court.

Pomeroy, perhaps the leading authority, describes the development of the law compactly in his Equity Jurisprudence in the following language:

> The courts have thus been required to face such questions as the nature and extent of the capitalist's rights in the management of his business and of the workingman's property in his labor; to decide how far the employer shall be protected in his right to have labor and custom flow to him free from the interference of third parties and how far the laborer shall be protected from similar interference in his contract of employment or his right to secure employment; to determine what limits shall be placed upon the individuals and combinations of individuals in seeking their economic advancement at the expense of their fellows. All these and other problems have come before the courts in rapid succession. (Pomeroy, Equity Jurisprudence (4th Ed.) vol. 5, p. 4566, sec. 2018.)

There can be no question, therefore, that there has been created, as a result of writing law into injunction orders and then enforcing those orders by the same judge who wrote them without a grant of trial by jury, that condition of uniting the two powers of making and enforcing laws in one person or one body of men wherein, using the language of Blackstone, "there can be no public liberty."

It is difficult to see how any civilized people could indefinitely submit to such tyrannical procedure. It is not difficult to understand how such cruel laws, made not by any legislature but by a judge upon the bench, should bring our Federal courts into disrepute. Neither is it difficult to see how such injunctions, violating the conscience of civilization, should frighten persons against whom such injunctions are issued into desperation. What

free American citizen is willing to submit to the violation of his sacred rights of human liberty and freedom?

Responsibility for Unlawful Acts

Section 6 of the bill relates to damages for unlawful acts arising out of labor disputes. It is provided that officers and members of any labor organization, and officers and members of any employers' organization, shall not be held liable for damages unless it is proven that the defendant either participated in or authorized such unlawful acts, or ratified such unlawful acts after actual knowledge thereof.

To hold that officers or members of a labor organization, or the organization itself, should be liable for damages for unlawful acts committed while a strike is on, without clear, actual proof of authorization, participation in, or ratification of such unlawful acts, would go far toward the destruction of organized labor.

Moreover, it will be observed that this section, as do most all of the other prohibitive sections of the bill, applies both to organizations of labor and organizations of capital. The same rule throughout the bill, wherever it is applicable, applies both to employers and employees, and also to organizations of employers and employees.

In most cases where strikes occur involving a great many employers and employees and covering a comparatively large territory, there are often unlawful acts committed in the way of injury to property or to persons. It is not the intention of the bill to protect anybody, whether he be employer or employee, from punishment for the commission of unlawful acts either as against property or persons. But no person or organization should be held thus liable unless he or it caused the unlawful act or participated in it or ratified it. It has often occurred that employers themselves have secured the services of detectives who, under the guise of labor men, have gained ad-

mission into labor unions. When this happens these detectives are usually doing everything within their power to incite employees who are on strike to commit acts of violence, and such detectives, contrary to the definite instructions of labor union leaders, sometimes commit unlawful acts for the express and only purpose of laying the foundation for injunctive process, of bringing discredit upon the union, and of making its officers and members liable for damages.

In case of a strike, where the officers of the labor union are doing everything within their power to prevent acts of violence from being committed by any person, the law should fully protect them and save them and the members of their organization who are following their advice from liability in damages because of unlawful acts of persons who are either directly or indirectly connected with those who are trying to defeat the purpose of the strike.

Opposition to this section has been voiced on the ground that it seeks to establish a "new law of agency." In the first place, this section is concerned especially with establishing a rule of evidence. There is no provision made relieving an individual from responsibility for his acts, but provision is made that a person shall not be held responsible for an "unlawful act" except upon "clear proof" of participation or authorization or ratification. Thus a rule of evidence, not a rule of substantive law, is established. "The general power of every legislature to prescribe the evidence which shall be received and the effect of that evidence in the courts of its own government," has been repeatedly upheld by the Supreme Court. (See Fong Yue Ting *v.* U. S., 149 U. S. 698, 749; Bailey *v.* Alabama, 219 U. S. 219, 238.)

But the argument is made that a man is held legally responsible for the acts of his agents taken in due course of employment. This argument is evidently based upon a

doctrine of the civil law of negligence. It has no application to the criminal law. If a man is held responsible for an unlawful act, his responsibility rests on the basis of actual or implied participation. He is responsible for conspiring to do an unlawful act or for setting in motion forces intended to result, or necessarily resulting, in an unlawful act.

> Strictly speaking, the legal relation of principal and agent does not exist in regard to the commission of criminal offenses. All who participate in the commission of such offense are either principals or accessories. (Anderson *v.* State, 22 Ohio State 305.)
>
> But where the agent's criminal act is unauthorized and is not sanctioned or acquiesced in by the principal, especially where it is contrary to the principal's direct instructions, the latter can not be held criminally responsible therefor. (Clark and Skyles, Law of Agency, Vol. I, p. 1140.)

The distinction should be clear. A man operating a dangerous machine negligently injures someone, and the negligence is imputed to the employer. But there is a distinction between the torts of an employee and the crimes of an employee, and criminal responsibility is not to be imputed. If the president of a corporation sends a bill collector to persuade a debtor to pay a bill, instructing him to collect it in a peaceable manner, he does not become responsible for an assault by his employee upon the debtor.

According to the same reasoning, why should an officer of a labor union, who has specifically advised members that violence must be avoided, become responsible for the hot-headed action of some member in perhaps assaulting a strike breaker? Again, the relationship between officers and members of labor unions and other members is not that of employer and employee. The officers chosen by a union are not employers of the membership. They have no control over their associates based upon the power of

determining whether or not they will employ them. It may be accepted that if a group associated in common activities becomes controlled by a lawless majority, it may be necessary for law-abiding men to dissolve their association with lawbreakers; but the doctrine that a few lawless men can change the character of an organization whose members and officers are very largely law-abiding is one which has been developed peculiarly as judge-made law in labor disputes, and it is high time that, by legislative action, the courts should be required to uphold the long established law that guilt is personal and that men can only be held responsible for the unlawful acts of associates because of participation in, authorization or ratification of such acts. As a rule of evidence, clear proof should be required, so that criminal guilt and criminal responsibility should not be imputed but proven beyond reasonable doubt in order to impose liability.

There has been a distinct conflict of opinion in the courts as to the degree of proof required. Mere ex parte affidavits establishing a certain amount of lawless conduct in the prosecution of a strike have been held in some instances to establish a "presumption" that the entire union and its officers were engaged in an unlawful conspiracy; and, on the other hand, other courts have declined thus to substitute inference for proof, rejecting such a doctrine in language such as the following used in a New York case: "Is it the law that a presumption of guilt attaches to a labor union association?" Various examples of these different rulings are quoted in The Labor Injunction, by Frankfurter and Greene, pp. 74-75.

It is appropriate and necessary to define by legislation the proper rule of evidence to be followed in this matter in Federal courts. That is the only object of section 6.

Procedure

The bill, in section 7, provides for the procedure which shall be followed in case application is made for a temporary restraining order or for a temporary or permanent injunction. It provides that no temporary or permanent injunction shall be issued except after hearing the testimony of witnesses, under oath, in open court. The court is also required, before it issues a temporary or permanent injunction, to permit the defendants to offer testimony in opposition to such injunctions; and, before the court is authorized to issue the temporary or permanent injunction, it must find that unlawful acts have been threatened or committed and will be executed or continued unless restrained; that substantial and irreparable injury to complainant's property will follow, and that as to each item of relief granted greater injury will be inflicted upon complainant by the denial of relief than will be inflicted upon defendants by the granting of relief.

This procedure balances the effect of an order upon both parties, and while an injunction might be granted against certain unlawful acts the injury to complainant from such acts can not be made the basis of enjoining other acts from which complainant will suffer but little, but the prohibition of which may cause greater injury to the defendants. This is only statutory sanction of the best and long established practice in equity. (See Pomeroy, Equity Jurisprudence (4th ed.), sec. 1685.)

It is likewise provided in section 7, that in addition to the ordinary requirements applying to all applications for injunction, the court must find—

> That the public officers charged with the duty to protect complainant's property have failed or are unable to furnish adequate protection.

This is an entirely new provision, but it is believed to be a just one.

These injunctions are issued upon an allegation, among other things, that unless the order is issued complainant's property will be injured or destroyed. If the public officers whose duty it is to protect complainant's property are able and willing to give the protection required by law, there is no reason why the court of equity should take over the functions of the executive department and undertake to police their districts and no reason why the extraordinary and one-sided remedy of an injunction should be resorted to. It seems, therefore, but fair that before the injunction is issued, the court should find from the evidence that such officers have failed or are unable to furnish the protection required by law.

Injunctions are often applied for and issued for the moral effect that such injunctions will have in disheartening and discouraging employees engaged in a strike, rather than because of any real necessity to protect property.

Provision is also made in the bill for the issuance of a temporary restraining order without notice. This can be done only if the complainant shall alleged that such temporary restraining order is necessary and that if time is taken to give notice a substantial and irreparable injury to complainant's property will be unavoidable.

Before issuing such temporary restraining order, however, the court must take testimony under oath, and such testimony must be sufficient, if sustained, to justify the court in issuing a temporary injunction upon a hearing after notice.

Injunctions issued without notice to the defendants against whom the injunctive order is sought are always ex parte. No good reason exists why this evidence thus taken, without the presence of the defendant, should not be required to be sufficient, if sustained, to sustain an order issued after notice and hearing. If the complainant

can not make a prima facie case without notice, he certainly never would be able to make such a case after notice when the defendant was in court contesting the issuing of the injunction.

The bill provides that such temporary restraining order so issued without notice shall not be effective for a longer time than five days. This, however, is a reasonable requirement. The only object in issuing a temporary restraining order without notice is because it is alleged by the complainant that notice of such application would bring about destruction of his property. Therefore, the time that such an extraordinary process should be effective without notice should not be prolonged beyond the time that it would take to give notice, and it is difficult for any mind to conceive of a condition where notice could not be given and a hearing held within the 5-day limit.

It is provided in section 8 that no restraining order or injunctive relief shall be granted to any complainant who has not complied with any obligation imposed by law in regard to the settlement of any labor dispute. Neither shall such order issue unless the complainant has made every reasonable effort to settle such dispute, either by the aid of negotiation or with the aid of any available governmental machinery of mediation or voluntary arbitration. But where such negotiations are in progress and have not been completed, the court is not required, before issuing the writ, to await the outcome of such action if the court is satisfied that irreparable injury is threatened.

This section simply requires that a complainant shall not be entitled to injunctive relief who has failed to comply with any legal obligations which may exist, to be performed on his part. In other words, he must go into court with clean hands. This doctrine here announced is that persons have no right to seek the aid of Federal courts and impose upon them additional burdens who have not

sought to do all within their power to avoid the aid of the courts and who are not themselves aggravating or causing the dispute by violation of legal obligations.

It has often occurred, where employers have refused to confer with their employees, as required by law; or where they have refused to comply with the requirements of the law for the protection of employees, that they have nevertheless sought to have the court restrain the employees from promoting their interests properly in the resulting dispute. An employer who has himself brought on a controversy by wrongful conduct is not entitled to the aid of equity in advancing his interests in the resulting conflict.

> A court of equity acts only when and as conscience commands; and if the conduct of the plaintiff be offensive to the dictates of natural justice, then, whatever may be the rights he possesses, and whatever use he may make of them in a court of law, he will be held remediless in a court of equity. (Deweese *v.* Reinhard, 165 U. S. 386, 390.)

Other cases and authorities upholding this principle written into the proposed bill are cited in the recent opinion of the Supreme Court of Wisconsin in Adler & Sons *v.* Maglio (228 N. W. 123), where the court denied injunctive relief and dismissed the complaint of an employer whose conduct was described by the court as follows:

> Plaintiff pursued a course of conduct that precipitated a labor war. When the tide of battle seemed to be setting against it, the plaintiff sought to withdraw from the field to which it had deliberately gone, and appealed to a court of equity for protection from the consequences that naturally flowed from the course of conduct which it had deliberately pursued.
>
> A court of conscience will not extend its strong arm to protect one who has pursued such a course of conduct. It will leave such applicant for relief where it had deliberately chosen to place itself. (P. 125.)

Later the court further upheld application of the equitable rule in the following language:

> Its strict application to all labor controversies ought to admonish both parties to these modern industrial struggles that, while they may conduct their own affairs in any way that does not violate the law, neither can be guilty of conduct that invades the rights of the other in regard to, or all events connected with, the matter of litigation, so as to in some measure affect the equitable relations subsisting between the two parties without forfeiting all right to resort to the extraordinary powers of equity. (P. 126.) (See also Cornellier *v.* Haverhill Shoe Manufacturers Association, 212 Mass. 554; Weegham *v.* Killefer, 215 Fed. 168; Pomeroy, Equity Jurisprudence (fourth ed.) sec. 398).

The bill also provides for a speedy appeal by any party to the case who may be dissatisfied with the action of the court, either in allowing or denying the injunction; and when a case is appealed to the circuit court of appeals, it becomes the duty of that court to consider the case with the greatest possible expedition and to give such cases precedence over all other matters except older matters of the same character.

Jury Trial in Contempt Cases

Section 11 of the bill provides that where a person is charged with indirect criminal contempt for violation of a restraining order or injunction, the defendant shall have the right to demand a speedy and public trial by a jury. This requirement does not apply to contempts committed in the presence of the court or so near thereto as to interfere directly with the administration of justice. Neither does it apply to misbehavior, misconduct, or disobedience of any officer of the court in respect to the writs, orders, or process of the court.

Section 12 provides that the defendant in any proceed-

ing for contempt of court is authorized to file with the court a demand for the retirement of the judge sitting in the proceeding if the alleged contempt arose from an attack upon the character or the conduct of the judge and if the attack occurred otherwise than in open court. Upon the finding of such a demand another judge shall be designated to hear the contempt proceeding, as provided in Section 21 of the Judicial Code.

It will be observed that sections 11 and 12 have a general application and are not confined to labor disputes.

The ordinary criminal laws provide that any person charged with a crime shall have the right to a jury trial. The person tried for contempt of court is tried for a criminal act. It is true this act has not been made criminal by a statute, but by the order of a judge. The judgment, however, can deprive the defendant of his liberty, can confine him to jail, and the length of the term of confinement is within the discretion of the judge who made the order. The judge becomes the legislature and, as such legislature, he makes something a crime that is not a crime under the general law. He then sits in judgment and tries the person who is charged with violating the law which he has enacted. What difference is it to the defendant, so far as his punishment is concerned, whether the law has been made by the judge or by the legislature? His suffering is just as great in one case as in the other. Why should he be deprived of a jury trial when the law is made by one man instead of by the regular legislative authority? And in addition to all this, what defense can be made of the law which provides that the defendant shall have no opportunity, not only for an impartial jury, but for an impartial judge as well? And when the charge is made that the contempt arises from an attack upon the character or the conduct of the judge, what principle of justice would permit this same judge to sit in judgment upon

the accused? All sense of justice and all fair judicial procedure revolt at such a condition.

If an attack is made upon the character or the conduct of the judge by a writer in a newspaper, for instance, is it fair, is it compatible with our idea of jurisprudence, that the judge against whom the attack is made should preside at the trial of the offender? Suppose a judge were assaulted on the street by a common thug. Our procedure would not permit this judge to sit at the trial of the person charged with the assault and battery. He would be tried under the laws provided by the legislature. In an injunction case, the general laws of the legislature would not apply. The person assaulted would not only preside at the trial but he would fix the punishment without regard to statute but in accordance with his own idea as to what the punishment should be.

It is interesting to note that, severe as was ancient law, it was the prevailing practice in the English courts for centuries that trials for criminal contempt were tried by a jury. It is only in the American courts in the last century that such trials by the judge alone developed. And yet we live under a Constitution which provides that—

> In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed. (Amendment 6.)

Also—

> The trial of all crimes, except in cases of impeachment, shall be by jury. (Art. III.)

The power of the Congress to require trial by jury in cases of indirect criminal contempt should not be now subject to serious question. Criminal contempt consists of disobedience of the orders of the court, obstructions to the administration of justice, which are punished as an offense against the court and differ from civil contempt in

that the purpose of punishment is not to grant relief to a litigant but to maintain the dignity of the court and uphold the power of Government. Direct criminal contempts consist of misbehavior in the presence of the court or so near thereto as to interfere directly with the administration of justice. Such contempts are expressly excepted from the provisions of trial by jury. Indirect criminal contempt consists of violation of the orders of the court, which is exactly the same as the violation of law, except that the law is written in the order of the court instead of in a statute.

The Supreme Court sustained the right of trial by jury required by congressional enactment in the Clayton Act in cases of indirect criminal contempt in the case of Michaelson *v.* United States (266 U. S. 42), where the unanimous opinion of the Supreme Court, written by Mr. Justice Sutherland, reads as follows:

> Contempts of the kind within the terms of the statute (criminal contempts described in the Clayton Act) partake of the nature of crimes in all essential particulars. "So truly are they crimes that it seems to be proved that in the early law they were punished only by the usual criminal procedure, 3 Transactions of the Royal Historical Society, N. S., p. 147 (1885), and that at least in England it seems that they still may be and preferably are tried in that way." Gompers *v.* U. S. (233 U. S., 604, 610-611). • • • The statutory extension of this constitutional right (trial by jury) to a class of contempts which are properly described as "criminal offenses" does not, in our opinion, invade the powers of the courts as intended by the Constitution or violate that instrument in any other way (pp. 66-67).

Section 13 of the bill defines various terms used in the act, and it is not believed that any criticism has been or will be made to these definitions.

The main purpose of these definitions is to provide for

limiting the injunctive powers of the Federal courts only in the special type of cases, commonly called labor disputes, in which these powers have been notoriously extended beyond the mere exercise of civil authority and wherein the courts have been converted into policing agencies devoted in the guise of preserving peace, to the purpose of aiding employers to coerce employees into accepting terms and conditions of employment desired by employers.

The proposed bill is designed primarily as a practical means of remedying existing evils, and limitations are imposed upon the courts in that class of cases wherein these evils have grown up and become intolerable. This is a reasonable exercise of legislative power, and in order that the limitation may not be whittled away by refined definitions of what persons are to be regarded as legitimately involved in labor disputes, the bill undertakes specifically to designate those persons, who are entitled to invoke the protections of the procedure required.

The other sections of the bill contain the usual provisions in regard to the possibility of the court's holding portions of the act invalid and in relation to the repeal of acts in conflict with the provisions of the proposed legislation.